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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
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By Deputy *[Signature]*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ASARCO INCORPORATED,

Defendant.

CIVIL ACTION NO.

C91-5528 B

COMMENCEMENT BAY
NEARSHORE/TIDEFLATS
SUPERFUND SITE --
ASARCO TACOMA SMELTER
CONSENT DECREE



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1 an opportunity to participate in such negotiations and be a party
2 to this Consent Decree.

3 4. In accordance with Section 122(j)(1) of CERCLA,
4 42 U.S.C. § 9622(j)(1), EPA notified the federal, state, and
5 Indian tribal natural resource trustees for the Site on
6 June 30, 1995, of negotiations with Asarco regarding the release
7 of hazardous substances that may have resulted in injury to the
8 natural resources under their trusteeships and encouraged the
9 trustees to participate in the negotiation of this Consent
10 Decree. The natural resource trustees for the Site are: (a) the
11 National Oceanic and Atmospheric Administration of the Department
12 of Commerce, (b) the Department of the Interior, (c) the State of
13 Washington Department of Ecology (on behalf of the Washington
14 Departments of Fisheries, Natural Resources, and Wildlife), (d)
15 the Puyallup Tribe of Indians, and (e) the Muckleshoot Indian
16 Tribe (hereinafter collectively referred to as the "Natural
17 Resource Trustees").

18 5. Asarco does not admit any liability to the Plaintiff
19 arising out of the transactions or occurrences alleged in the
20 complaint, nor does Asarco acknowledge that the release or
21 threatened release of hazardous substance(s) at or from the Site
22 constitutes an imminent or substantial endangerment to the public
23 health or welfare or the environment.

24 6. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605,
25 EPA placed the Site on the National Priorities List, set forth at
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1 40 C.F.R. Part 300, Appendix B, by publication in the Federal
2 Register on September 8, 1983, 48 Fed. Reg. 40,658.

3 7. Because of the complexity of the CB/NT site,
4 Superfund response actions at the CB/NT site are currently
5 coordinated under seven separate operable units managed primarily
6 by EPA and Ecology, including: (a) Operable Unit 01 -- CB N/T
7 Sediments; (b) Operable Unit 02 -- Asarco Tacoma Smelter;
8 (c) Operable Unit 03 -- Tacoma Tar Pits; (d) Operable Unit 04 --
9 Asarco Off-Property; (e) Operable Unit 05 -- CB N/T Sources; (f)
10 Operable Unit 06 -- Asarco Sediments; and (g) Operable Unit 07 --
11 Asarco Smelter Demolition. This Consent Decree involves Operable
12 Unit 02.

13 8. Pursuant to an Administrative Order on Consent dated
14 September 1986, Asarco agreed to perform immediate site
15 stabilization activities at the Site and to conduct a Remedial
16 Investigation and Feasibility Study ("RI/FS") of the Asarco
17 Smelter and the surrounding area to determine the nature and
18 extent of contamination and to evaluate alternatives for
19 remediation of the Site.

20 9. Pursuant to a Consent Decree entered in United States
21 v. ASARCO Incorporated, Civil NO. C91-5528 B, Western District of
22 Washington, on May 19, 1992, Asarco agreed to conduct interim
23 remedial actions at the Site including the demolition of most of
24 the remaining structures. The requirements of that Consent
25 Decree have been satisfied.

1 10. Pursuant to an Administrative Order on Consent for
2 Ground Water, Surface Water, Soil and Marine Sediments Monitoring
3 and Sampling, Docket No. 10-94-0221, as amended, Asarco agreed to
4 conduct certain monitoring and sampling both on the Site and off-
5 shore of the Site. The monitoring and sampling activities are
6 ongoing. After obtaining sufficient information from the
7 monitoring and sampling activities, EPA will issue separate
8 records of decision for subsurface groundwater at the Site and
9 the offshore sediments.

10 11. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617,
11 EPA published notice of the completion of the RI, FS and of the
12 proposed plan for remedial action on August 12, 1994, in a major
13 local newspaper of general circulation. EPA provided an
14 opportunity for written and oral comments from the public on the
15 proposed plan for remedial action. A copy of the transcript of
16 the public meeting is available to the public as part of the
17 administrative record upon which the Regional Administrator based
18 the selection of the response action.

19 12. The decision by EPA on the remedial action to be
20 implemented at the Site is embodied in a final Record of Decision
21 ("ROD"), executed on March 24, 1995 (Appendix A), on which the
22 State has given its concurrence. The ROD includes a
23 responsiveness summary to the public comments. Notice of the
24 final plan was published in accordance with Section 117(b) of
25 CERCLA, 42 U.S.C. § 9617.

1 13. Concurrent with EPA's efforts to select the response
2 action and issue the ROD, Asarco, the Town of Ruston, the City of
3 Tacoma, and the Metropolitan Park District formed a "land use
4 committee" and hired consultants to help the group develop a
5 Master Development Plan for future development of the Site after
6 remediation. This effort involved significant citizen
7 participation. Asarco and the land use committee held four week-
8 long public forums called "Asarco Weeks" over an eight-month
9 period to solicit ideas regarding the future use of the Asarco
10 property. These efforts resulted in an "Agreement in Principle,"
11 negotiated by Asarco, the City of Tacoma, The Town of Ruston, and
12 the Metropolitan Park District of Tacoma, that outlines a
13 proposal for development of the Asarco Site, including
14 responsibilities among the signatories for such development.
15 The "Agreement in Principle" adopts the development alternative
16 "G-2.1", the consensus approach resulting from the Asarco Weeks,
17 and provides general guidelines for open space and development
18 zones, such as commercial, recreational, marine, and mixed uses,
19 and for surface roadways. The G-2.1 concept provides for a park
20 centered on the Site with a setback traffic center and a
21 crescent-shaped development area fronting on grassy areas facing
22 Commencement Bay. The park would extend from Ruston Way to Point
23 Defiance Park.

24 14. Based on the information presently available to EPA,
25 EPA believes that the Work (as defined below) will be properly
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1 and promptly conducted by Asarco if conducted in accordance with
2 the requirements of this Consent Decree and its appendices.

3 15. Solely for the purposes of Section 113(j) of CERCLA,
4 42 U.S.C. § 9613(j), the Remedial Action selected by the ROD and
5 the Work to be performed by Asarco shall constitute a response
6 action taken or ordered by the President.

7 16. Except as otherwise provided in this Consent Decree,
8 in signing this Consent Decree, Asarco denies any and all legal
9 and equitable liability and reserves all defenses under any
10 federal, state, local or tribal statute, regulation or common law
11 for any claim, endangerment, nuisance, response, removal,
12 remedial or other costs or damages incurred or to be incurred by
13 the United States, the State, or other entities or persons or any
14 natural resource damages as a result of the release or threat of
15 release of hazardous substances to, at, from or near the Site.
16 Pursuant to 42 U.S.C. § 9622(d)(1)(B), entry of this Consent
17 Decree is not an acknowledgement by Asarco that any release or
18 threatened release of a hazardous substance constituting an
19 imminent and substantial endangerment to human health or the
20 environment has occurred or exists at the Site or the CB N/T
21 site. Asarco does not admit and retains the right to controvert
22 any of the factual or legal statements or determinations made
23 herein in any judicial or administrative proceeding except in an
24 action to enforce this Consent Decree or as provided in Paragraph
25 120. Asarco does agree, however, to the Court's jurisdiction
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1 over this matter. This Consent Decree shall not be admissible in
2 any judicial or administrative proceeding against Asarco, over
3 its objection, as proof of liability or an admission of any fact
4 dealt with herein, but it shall be admissible in an action to
5 enforce this Consent Decree.

6 17. The Parties recognize, and the Court by entering
7 this Consent Decree finds, that this Consent Decree has been
8 negotiated by the Parties in good faith and implementation of
9 this Consent Decree will expedite the remediation of the Site and
10 will avoid prolonged and complicated litigation between the
11 Parties, and that this Consent Decree is fair, reasonable, and in
12 the public interest.

13 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

14 II. JURISDICTION

15 18. This Court has jurisdiction over the subject matter
16 of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and
17 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has
18 personal jurisdiction over Asarco. Solely for the purposes of
19 this Consent Decree and the underlying complaint, Asarco waives
20 all objections and defenses that it may have to jurisdiction of
21 the Court or to venue in this District. Asarco shall not
22 challenge the terms of this Consent Decree or this Court's
23 jurisdiction to enter and enforce this Consent Decree.

24 III. PARTIES BOUND

1 19. This Consent Decree applies to and is binding upon
2 the United States and upon Asarco and its successors and assigns.
3 Any change in ownership or corporate status of Asarco, including,
4 but not limited to, any transfer of Asarco's assets or real or
5 personal property shall in no way alter Asarco's responsibilities
6 under this Consent Decree.

7 20. Asarco shall provide a copy of this Consent Decree
8 to each contractor hired to perform the Work (as defined below)
9 required by this Consent Decree and to each person representing
10 Asarco with respect to the Site or the Work and shall condition
11 all contracts entered into hereunder upon performance of the Work
12 in conformity with the terms of this Consent Decree. Asarco and
13 its contractors shall provide written notice of the Consent
14 Decree to all subcontractors hired to perform any portion of the
15 Work required by this Consent Decree. Asarco shall nonetheless
16 be responsible for ensuring that its contractors and
17 subcontractors perform the Work contemplated herein in accordance
18 with this Consent Decree. With regard to the activities
19 undertaken pursuant to this Consent Decree, each contractor and
20 subcontractor shall be deemed to be in a contractual relationship
21 with Asarco within the meaning of Section 107(b)(3) of CERCLA, 42
22 U.S.C. § 9607(b)(3).

23 IV. DEFINITIONS

24 21. Unless otherwise expressly provided herein, terms
25 used in this Consent Decree which are defined in CERCLA or in
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1 regulations promulgated under CERCLA shall have the meaning
2 assigned to them in CERCLA or in such regulations. Whenever
3 terms listed below are used in this Consent Decree or in the
4 appendices attached hereto and incorporated hereunder, the
5 following definitions shall apply:

6 (a) "Agreement In Principle" means that agreement
7 entitled "ASARCO Incorporated, City of Tacoma, Town of Ruston,
8 Metropolitan Park District of Tacoma, Tacoma Smelter
9 Redevelopment Agreement in Principle."

10 (b) "Asarco" and "ASARCO Incorporated" means the New
11 Jersey corporation of that name.

12 (c) "CERCLA" shall mean the Comprehensive Environmental
13 Response, Compensation, and Liability Act of 1980, as amended, 42
14 U.S.C. §§ 9601 et seq.

15 (d) "Consent Decree" shall mean this Decree and all
16 appendices attached hereto (listed in Section XXIX). In the
17 event of conflict between this Decree and any appendix, this
18 Decree shall control.

19 (e) Commencement Bay Nearshore/Tideflats Superfund site"
20 ("CB N/T site") shall mean the area designated on the National
21 Priorities List in September, 1983, as the CB N/T site, which is
22 located at the southern end of the main basin of Puget Sound,
23 near the City of Tacoma, Washington.

24 (f) "Contractor" or "subcontractor" means the company or
25 companies retained by or on behalf of Asarco to undertake and
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1 accomplish the Work and associated activities required by this
2 Consent Decree.

3 (g) "Day" shall mean a calendar day unless expressly
4 stated to be a working day. "Working day" shall mean a day other
5 than a Saturday, Sunday, or Federal holiday. In computing any
6 period of time under this Consent Decree, where the last day
7 would fall on a Saturday, Sunday, or Federal holiday, the period
8 shall run until the close of business of the next working day.

9 (h) "Ecology" shall mean the State of Washington
10 Department of Ecology and any successor departments or agencies
11 of the State.

12 (i) "EPA" shall mean the United States Environmental
13 Protection Agency and any successor departments or agencies of
14 the United States.

15 (j) "Future Response Costs" shall mean all response
16 costs, including, but not limited to, direct and indirect costs,
17 that the United States incurs in reviewing or developing plans,
18 reports and other items pursuant to this Consent Decree,
19 verifying the Work, or otherwise implementing, overseeing, or
20 enforcing this Consent Decree, including, but not limited to,
21 payroll costs, contractor costs, travel costs, laboratory costs,
22 the costs incurred pursuant to Sections VII, IX (including, but
23 not limited to, attorneys fees and any monies paid to secure
24 access and/or to secure institutional controls, including the
25 amount of just compensation), XV, and Paragraph 102 of Section
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XXI. Future Response Costs shall also include all Interim Response Costs and all Interest on the Past Response Costs that has accrued pursuant to 42 U.S.C. § 9607(a) on or after July 1, 1994 (on or after October 1, 1994 for DOJ costs) to the date of entry of this Consent Decree.

(k) "Interim Response Costs" shall mean all costs, including direct and indirect costs, (a) paid by the United States in connection with the Site on or after July 1, 1994 (on or after October 1, 1994 for DOJ costs) and the effective date of this Consent Decree, or (b) incurred prior to the effective date of this Consent Decree but paid after that date.

(l) "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year in accordance with 42 U.S.C. § 9607(a).

(m) "Master Development Plan" means the plan for redevelopment of the Site.

(n) "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

(o) "On-site" shall mean the areal extent of contamination, which shall include but is not limited to, the Site and all suitable areas in very close proximity to the

1 contamination necessary for implementation of the response
2 action.

3 (p) "Operation and Maintenance" or "O & M" shall mean
4 all activities required by the Statement of Work ("SOW") and by
5 the Remedial Design Reports ("RDRs") to maintain the
6 effectiveness of the Remedial Action.

7 (q) "Paragraph" shall mean a portion of this Consent
8 Decree identified by an arabic numeral or an upper case letter.

9 (r) "Parties" shall mean the United States and Asarco.

10 (s) "Past Response Costs" shall mean all response costs,
11 including, but not limited to, direct and indirect costs that the
12 United States paid at or in connection with the Site through June
13 30, 1994 (September 30, 1994 for DOJ costs), plus Interest on all
14 such costs which has accrued pursuant to 42 U.S.C. § 9607(a)
15 through such date, and for all unpaid costs incurred by the
16 Agency for Toxic Substances and Disease Registry (ATSDR) relating
17 to the Site or the Study Area as defined in the Consent Decree
18 entitled United States v. ASARCO, Cause No. 94-5714 RJB, Western
19 District of Washington, entered May 2, 1995.

20 (t) "Performance Standards" shall mean the remediation
21 standards and other measures of achievement of the goals of the
22 Remedial Action set forth in Section 9.9 of the ROD, the SOW, and
23 Section 2.1 of the RDRs. Performance Standards shall not include
24 the preliminary remediation goals for Class III groundwater set
25 forth in Table 9-2 of the ROD.

1 (u) "Plaintiff" shall mean the United States.

2 (v) "RCRA" shall mean the Solid Waste Disposal Act, as
3 amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource
4 Conservation and Recovery Act).

5 (w) "Record of Decision" or "ROD" shall mean the EPA
6 Record of Decision for Operable Unit 02, to the Asarco Tacoma
7 Smelter Facility signed on March 24, 1995, by the Regional
8 Administrator, EPA Region 10, and all attachments thereto.

9 (x) "Remedial Action" shall mean those activities,
10 except for Operation and Maintenance, to be undertaken by Asarco
11 to implement the ROD, in accordance with the SOW, RDRs and the
12 final Remedial Design and Remedial Action Work Plans and other
13 Plans approved by EPA.

14 (y) "Remedial Action Work Plan" shall mean the
15 document(s) developed by Asarco pursuant to Paragraph 31 of this
16 Consent Decree and approved by EPA, and any amendments thereto.

17 (z) "Remedial Design" shall mean those activities to be
18 undertaken by Asarco to develop the final plans and
19 specifications for the remedial action pursuant to the Remedial
20 Design Work Plan.

21 (aa) "Remedial Design Reports" (or "RDRs") means the
22 documents submitted by Asarco to implement the work required
23 under this Consent Decree. These RDRs are attached to the
24 Statement of Work (Appendix C) and are incorporated herein by
25 reference.

1 (bb) "Remedial Design Work Plan" shall mean the
2 document(s) developed pursuant to Paragraph 30 of this Consent
3 Decree and approved by EPA, and any amendments thereto.

4 (cc) "Section" shall mean a portion of this Consent
5 Decree identified by a roman numeral.

6 (dd) "Site", for purposes of this Consent Decree, shall
7 mean the Asarco smelter facility which is approximately sixty-
8 seven (67) acres in size, located in Ruston and Tacoma,
9 Washington, and the adjacent slag peninsula which is
10 approximately twenty-three acres in size, both of which are
11 depicted more particularly on the map attached as Appendix B, and
12 all suitable areas in very close proximity to the facility that
13 are necessary for implementation of this Remedial Action, except
14 that the Site does not include subsurface groundwater and
15 offshore sediments.

16 (ee) "State" shall mean the state of Washington.

17 (ff) "Statement of Work" or "SOW" shall mean the
18 Statement of Work for implementation of the Remedial Design,
19 Remedial Action, and Operation and Maintenance at the Site and
20 attached RDRs, as set forth in Appendix C to this Consent Decree
21 and any modifications made in accordance with this Consent
22 Decree.

23 (gg) "Supervising Contractor" shall mean the principal
24 contractor retained by Asarco to supervise and direct the
25 implementation of the Work under this Consent Decree.

(hh) "United States" shall mean the United States of America.

(ii) "Waste Material" shall mean (i) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (ii) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (iii) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (iv) any "dangerous waste" under Washington Administrative Code, Chapter 173-303.

(jj) "Work" shall mean all activities Asarco is required to perform under this Consent Decree, except those required by Section XXV (Retention of Records).

(kk) "Work Plans" shall mean the documents submitted by Asarco and approved by EPA as required under Section VI below.

V. GENERAL PROVISIONS

22. Objectives of the Parties

The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by Asarco, to reimburse response costs of the Plaintiff, and to resolve the claims of Plaintiff against Asarco as provided in this Consent Decree. It is also the objective of Asarco in entering into this Consent Decree to further the implementation of the "Agreement in Principle" and Master Development Plan.

1 23. Approval of RDRs and SOW

2 The United States has reviewed and approved the RDRs and
3 the SOW, attached hereto, and has found them consistent with the
4 ROD, the NCP and the requirements of relevant EPA remedial design
5 guidance documents.

6 24. Commitments by Asarco

7 Asarco shall finance and perform the Work in accordance
8 with this Consent Decree, the ROD, the SOW, the RDRs and all work
9 plans and other plans, standards, specifications, and schedules
10 set forth herein or developed by Asarco and approved by EPA
11 pursuant to this Consent Decree. Asarco shall also reimburse the
12 United States for Past Response Costs and Future Response Costs
13 as provided in this Consent Decree.

14 25. Consistency with "Agreement in
15 Principle" and Master Development Plan

16 a. Asarco, to the extent practicable, will conduct
17 the Work required by this Consent Decree in a manner that is
18 consistent with the provisions of the "Agreement in Principle"
19 and the Master Development Plan which have been developed by
20 Asarco, the Town of Ruston, City of Tacoma and Metropolitan Park
21 District. In the event that such consistency is not achievable,
22 the requirements of the Consent Decree shall control. EPA agrees
23 that, if human health and the environment are protected, it will
24 consider requests by Asarco to modify the Remedial Design and
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1 Remedial Action Work Plans as required to further implementation
2 of the "Agreement in Principle" and Master Development Plan.

3 b. The parties anticipate that upon completion of
4 the remediation, the Public Development Authority (PDA), as that
5 entity is described in the Agreement in Principle, will lease
6 some or all of the Site from Asarco. EPA intends, subject to its
7 nonreviewable discretion, to attempt to negotiate an agreement
8 and covenant not to sue with qualified PDA members, and other
9 potential purchasers and lessees, for use of the property
10 consistent with the remedy similar to the prospective purchaser
11 guidance document, "Guidance on Settlements with Prospective
12 Purchasers of Contaminated Property," 60 Fed. Reg. 34792, or
13 other guidance available at that time.

14 26. Compliance With Applicable Law

15 All activities undertaken by Asarco pursuant to this
16 Consent Decree shall be performed in accordance with the
17 requirements of all applicable federal and state laws and
18 regulations. Asarco must also comply with all applicable or
19 relevant and appropriate requirements of all federal and state
20 environmental laws as set forth in the ROD and the SOW. The
21 activities conducted pursuant to this Consent Decree, if approved
22 by EPA, shall be considered to be consistent with the NCP.

23 27. Permits

24 a. As provided in Section 121(e) of CERCLA and
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1 § 300.400(e) of the NCP, no permit shall be required for any
2 portion of the Work conducted entirely "on-site," as defined in
3 Section IV (Definitions). Where any portion of the Work that is
4 not on-site requires a federal or state permit or approval,
5 Asarco shall submit timely and complete applications and take all
6 other actions necessary to obtain all such permits or approvals.

7 b. Asarco may seek relief under the provisions of
8 Section XVIII (Force Majeure) of this Consent Decree for any
9 delay in the performance of the Work resulting from a failure to
10 obtain, or a delay in obtaining, any permit required for the
11 Work.

12 c. This Consent Decree is not, and shall not be
13 construed to be, a permit issued pursuant to any federal or state
14 statute or regulation.

15 28. Notice of Obligations to Successors-in-Title

16 a. Within fifteen (15) days after the entry of
17 this Consent Decree, Asarco shall record a certified copy of this
18 Consent Decree with the Recorder's Office, Pierce County, state
19 of Washington. Thereafter, each deed, title, or other instrument
20 conveying an interest in any property owned by Asarco and
21 included in the Site shall contain a notice stating that the
22 property is subject to this Consent Decree and shall reference
23 the recorded location of the Consent Decree and any restrictions
24 applicable to the property under this Consent Decree.

1 b. The obligations of Asarco with respect to the
2 provision of access and the implementation of institutional
3 controls under Section IX (Access and Institutional Controls)
4 shall be binding upon any and all persons who subsequently
5 acquire such interest or portion thereof (hereinafter
6 "Successors-in-Title"). Within fifteen (15) days after the entry
7 of this Consent Decree, Asarco shall record at the Recorder's
8 Office, Pierce County, state of Washington, a notice of
9 obligation to provide access under Section IX and related
10 covenants, if any. Each subsequent instrument conveying an
11 interest to any such property owned by Asarco and included in the
12 Site shall reference the recorded location of such notice and
13 covenants applicable to the property.

14 c. Asarco and any Successor-in-Title shall, at
15 least thirty (30) days prior to the conveyance of such interest,
16 give written notice of this Consent Decree to the grantee and
17 written notice to EPA of the proposed conveyance, including the
18 name and address of the grantee, and the date on which notice of
19 the Consent Decree was given to the grantee. In the event of any
20 such conveyance, Asarco's obligations under this Consent Decree,
21 including the obligations to provide or secure access pursuant to
22 Section IX, shall continue to be met by Asarco. In addition, if
23 the United States approves, the grantee may perform some or all
24 of the Work under this Consent Decree. In no event shall the
25 conveyance of an interest in property that is owned by Asarco
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1 within the Site release or otherwise affect the liability of
2 Asarco to comply with the Consent Decree.

3 VI. PERFORMANCE OF THE WORK BY ASARCO

4 29. Selection of Supervising Contractor

5 a. All aspects of the Work to be performed by
6 Asarco pursuant to Sections VI (Performance of the Work by
7 Asarco), VII (Remedy Review), and VIII (Quality Assurance,
8 Sampling and Data Analysis) of this Consent Decree shall be under
9 the direction and supervision of the Supervising Contractor, the
10 selection of which shall be subject to disapproval by EPA.
11 Within fifteen (15) days after the lodging of this Consent
12 Decree, Asarco shall notify EPA, in writing, of the name, title,
13 and qualifications of any contractor proposed to be the
14 Supervising Contractor. EPA will issue a notice of disapproval
15 or an authorization to proceed. If at any time thereafter,
16 Asarco proposes to change a Supervising Contractor, Asarco shall
17 give such notice to EPA and must obtain an authorization to
18 proceed from EPA, before the new Supervising Contractor performs,
19 directs, or supervises any Work under this Consent Decree.

20 b. If EPA disapproves a proposed Supervising
21 Contractor, EPA will notify Asarco in writing. Asarco shall
22 submit to EPA a list of contractors, including the qualifications
23 of each contractor, that would be acceptable to them within
24 thirty (30) days of receipt of EPA's disapproval of the
25 contractor previously proposed. EPA will provide written notice
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1 of the names of any contractor(s) that it disapproves and an
2 authorization to proceed with respect to any of the other
3 contractors. Asarco may select any contractor from that list
4 that is not disapproved and shall notify EPA of the name of the
5 contractor selected within twenty-one (21) days of EPA's
6 authorization to proceed.

7 c. If EPA fails to provide written notice of its
8 authorization to proceed or disapproval as provided in this
9 Paragraph and this failure prevents Asarco from meeting one or
10 more deadlines in a plan approved by the EPA pursuant to this
11 Consent Decree, Asarco may seek relief under the provisions of
12 Section XVIII (Force Majeure) hereof.

13 30. Remedial Design

14 a. Within 60 days after EPA's issuance of an
15 authorization to proceed pursuant to Paragraph 29, Asarco shall
16 submit to EPA and the State a work plan for the design of the
17 Remedial Action at the Site ("Remedial Design Work Plan"). The
18 Remedial Design Work Plan shall provide for design of the remedy
19 set forth in the ROD, in accordance with the SOW and RDRs, and
20 for achievement of the Performance Standards and other
21 requirements set forth in the ROD, this Consent Decree and/or the
22 SOW or RDRs. Upon its approval by EPA, the Remedial Design Work
23 Plan shall be incorporated into and become enforceable under this
24 Consent Decree. In accordance with the provisions of the SOW,
25 Asarco shall submit to EPA and the State a Health and Safety Plan
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1 for field design activities which conforms to the applicable
2 Occupational Safety and Health Administration and EPA
3 requirements including, but not limited to, 29 C.F.R. § 1910.120.

4 b. In accordance with the provisions of the SOW
5 and RDRs, the Remedial Design Work Plan shall include plans and
6 schedules for implementation of all remedial design and pre-
7 design tasks.

8 c. Upon approval of the Remedial Design Work Plan
9 by EPA, after a reasonable opportunity for review and comment by
10 the State, and submittal of the Health and Safety Plan for all
11 field activities to EPA and the State, Asarco shall implement the
12 Remedial Design Work Plan. Asarco shall submit to EPA and the
13 State all plans, submittals and other deliverables required under
14 the approved Remedial Design Work Plan in accordance with the
15 approved schedule for review and approval pursuant to Section XI
16 (EPA Approval of Plans and Other Submissions). Unless otherwise
17 directed by EPA, Asarco shall not commence further Remedial
18 Design activities at the Site prior to approval of the Remedial
19 Design Work Plan.

20 d. The preliminary design, intermediate design and
21 pre-final/final design submittals for each primary activity
22 described in the SOW and RDRs shall meet the requirements
23 specified in the SOW and RDRs.

24 e. Remedial Design for each primary activity
25 described in the SOW and RDRs will be completed by Asarco and
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1 approved by EPA before field work begins on that primary
2 activity. The design documents that Asarco shall submit to EPA
3 at each design stage are specified in the SOW.

4 31. Remedial Action

5 a. As part of each Remedial Design final design
6 submittal for each primary activity, Asarco shall submit to EPA
7 and the State, a work plan for the performance of the Remedial
8 Action for that specific primary activity at the Site. The
9 Remedial Action Work Plan, which consists of all of the approved
10 final designs for the primary activities, shall provide for
11 construction and implementation of the remedy set forth in the
12 ROD and achievement of the Performance Standards, in accordance
13 with this Consent Decree, the ROD, the SOW, the RDRs and the
14 design plans and specifications developed in accordance with the
15 Remedial Design Work Plan and approved by EPA. Upon its approval
16 by EPA, the Remedial Action Work Plan shall be incorporated into
17 and become enforceable under this Consent Decree. At the same
18 time as it submits the Remedial Action Work Plan, Asarco shall
19 submit to EPA and the State a Health and Safety Plan for field
20 activities required by the Remedial Action Work Plan which
21 conforms to the applicable Occupational Safety and Health
22 Administration and EPA requirements including, but not limited
23 to, 29 C.F.R. § 1910.120.

1 b. In accordance with the provisions of the SOW and
2 RDRs, the Remedial Action Work Plan shall include plans and
3 schedules for implementation of all remedial action.

4 c. Upon approval of the Remedial Action Work Plan
5 by EPA, after a reasonable opportunity for review and comment by
6 the State, Asarco shall implement the activities required under
7 the Remedial Action Work Plan. Asarco shall submit to EPA and
8 the State all plans, submittals, or other deliverables required
9 under the approved Remedial Action Work Plan in accordance with
10 the approved schedule for review and approval pursuant to Section
11 XI (EPA Approval of Plans and Other Submissions). Unless
12 otherwise directed by EPA, Asarco shall not commence physical
13 Remedial Action activities at the Site prior to approval of the
14 Remedial Action Work Plan.

15 d. Asarco shall continue to implement the Remedial
16 Action and O&M until the Performance Standards are achieved and
17 for so long thereafter as is otherwise required under this
18 Consent Decree.

19 32. Modification of the SOW or Related Work Plans

20 a. If EPA determines that modification to the work
21 specified in the SOW and/or in work plans developed pursuant to
22 the SOW is necessary to achieve and maintain the Performance
23 Standards or to carry out and maintain the effectiveness of the
24 remedy set forth in the ROD, EPA may require that such
25 modification be incorporated in the SOW and/or such work plans.

1 Provided, however, that a modification may only be required
2 pursuant to this Paragraph to the extent that it is consistent
3 with the scope of the remedy selected in the ROD.

4 b. For the purposes of this Paragraph 32 and
5 Paragraphs 65 and 66 only, the "scope of the remedy selected in
6 the ROD" is: excavation of source area soils on the Site;
7 disposal of source area soils and demolition debris designated as
8 hazardous waste in an on-site containment facility that meets or
9 exceeds regulatory standards for hazardous waste landfills;
10 capping of the entire Site with a low permeability cap;
11 incorporation of site infrastructure into design and construction
12 of the cap to the extent practicable (e.g, sewers, electrical
13 lines, other utilities and roads); demolition of the remaining
14 buildings and structures on the portion of the Site owned by
15 Asarco; replacement of the entire surface water drainage system
16 and evaluation of surface water treatment if surface water goals
17 are not met; diversion of ground water and off-site surface
18 water; armoring of portions of the plant site and slag peninsula
19 shoreline as necessary to control erosion; development and
20 implementation of a mitigation plan to compensate for shoreline
21 armoring activities or impacts to wetlands if such activities or
22 impacts result in unacceptable adverse impacts to habitat;
23 continued monitoring of surface water and ground water at the
24 Site; and development and implementation of an enforceable
25 program of restrictions and guidelines to supplement the actual
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1 remediation activities to ensure that the remedial action remains
2 protective and that development activities do not impact the
3 long-term effectiveness of the remediation. Remediation of
4 subsurface groundwater is specifically excluded from the scope of
5 the remedy for purposes of this Consent Decree.

6 c. If Asarco objects to any modification determined
7 by EPA to be necessary pursuant to this Paragraph, it may seek
8 dispute resolution pursuant to Section XIX (Dispute Resolution),
9 Paragraph 83 (record review). The SOW and/or related work plans
10 shall be modified in accordance with final resolution of the
11 dispute.

12 d. Asarco shall implement any work required by
13 any modifications incorporated in the SOW and/or in work plans
14 developed pursuant to the SOW in accordance with this Paragraph.

15 e. Nothing in this Paragraph shall be construed
16 to limit EPA's authority to require performance of further
17 response actions as otherwise provided in this Consent Decree.

18 33. Asarco acknowledges and agrees that nothing in this
19 Consent Decree, the SOW, or the Remedial Design or Remedial
20 Action Work Plans constitutes a warranty or representation of any
21 kind by Plaintiff that compliance with the work requirements set
22 forth in the SOW and the Work Plans will achieve the Performance
23 Standards. Asarco's compliance with the work requirements shall
24 not foreclose Plaintiff from seeking compliance with all terms
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1 and conditions of this Consent Decree, including, but not limited
2 to, the applicable Performance Standards.

3 34. Asarco shall, prior to any off-Site shipment of
4 Waste Material from the Site to an out-of-state waste management
5 facility, provide written notification to the appropriate state
6 environmental official in the receiving facility's state and to
7 the EPA Project Coordinator of such shipment of Waste Material.
8 However, this notification requirement shall not apply to any
9 off-Site shipments when the total volume of all such shipments
10 will not exceed 10 cubic yards.

11 a. Asarco shall include in the written
12 notification the following information, where available: (i) the
13 name and location of the facility to which the Waste Material is
14 to be shipped; (ii) the type and quantity of the Waste Material
15 to be shipped; (iii) the expected schedule for the shipment of
16 the Waste Material; and (iv) the method of transportation.

17 Asarco shall notify the state in which the planned receiving
18 facility is located of major changes in the shipment plan, such
19 as a decision to ship the Waste Material to another facility
20 within the same state, or to a facility in another state.

21 b. The identity of the receiving facility and
22 state will be determined by Asarco following the award of the
23 contract for Remedial Action construction. Asarco shall provide
24 the information required by Paragraph 34.a as soon as practicable
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1 after the award of the contract and before the Waste Material is
2 actually shipped.

3 VII. REMEDY REVIEW

4 35. Periodic Review. Asarco shall conduct any studies
5 and investigations as requested by EPA, in order to permit EPA to
6 conduct reviews of whether the Remedial Action is protective of
7 human health and the environment at least every five (5) years as
8 required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and
9 any applicable regulations.

10 36. EPA Selection of Further Response Actions. If EPA
11 determines, at any time, that the Remedial Action is not
12 protective of human health and the environment, EPA may select
13 further response actions for the Site in accordance with the
14 requirements of CERCLA and the NCP.

15 37. Opportunity to Comment. Asarco and, if required by
16 Sections 113(k)(2) or 117 of CERCLA, the public, will be provided
17 with an opportunity to comment on any further response actions
18 proposed by EPA as a result of the review conducted pursuant to
19 Section 121(c) of CERCLA and to submit written comments for the
20 record during the comment period.

21 38. Asarco's Obligation to Perform Further Response
22 Actions. If EPA selects further response actions for the Site,
23 Asarco shall undertake such further response actions to the
24 extent that the reopener conditions in Paragraph 98 or Paragraph
25 99 (United States' reservations of liability based on unknown
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1 conditions or new information) are satisfied. Asarco may invoke
2 the procedures set forth in Section XIX (Dispute Resolution) to
3 dispute (1) EPA's determination that the reopener conditions of
4 Paragraph 98 or Paragraph 99 of Section XXI (Covenants Not to Sue
5 by Plaintiff(s)) are satisfied, (2) EPA's determination that the
6 Remedial Action is not protective of human health and the
7 environment, or (3) EPA's selection of the further response
8 actions. Disputes pertaining to whether the Remedial Action is
9 protective or to EPA's selection of further response actions
10 shall be resolved pursuant to Paragraph 83 (record review).

11 39. Submissions of Plans. If Asarco is required to
12 perform further response actions pursuant to Paragraph 38 it
13 shall submit a plan for such work to EPA for approval in
14 accordance with the procedures set forth in Section VI
15 (Performance of the Work by Asarco) and shall implement the plan
16 approved by EPA in accordance with the provisions of this Consent
17 Decree.

18 VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

19 40. Asarco shall use quality assurance, quality control,
20 and chain of custody procedures for all samples in accordance
21 with "EPA Requirements for Quality Assurance Project Plans for
22 Environmental Data Operation," (EPA QA/R5; "Preparing Perfect
23 Project Plans," (EPA/600/9-88/087), and subsequent amendments to
24 such guidelines upon notification by EPA to Asarco of such
25 amendment. Amended guidelines shall apply only to procedures
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1 conducted after such notification. Prior to the commencement of
2 any monitoring project under this Consent Decree, Asarco shall
3 submit to EPA for approval, after a reasonable opportunity for
4 review and comment by the State, a Quality Assurance Project Plan
5 ("QAPP") that is consistent with the SOW, the NCP and applicable
6 guidance documents. If relevant to the proceeding, the Parties
7 agree that validated sampling data generated in accordance with
8 the QAPP(s) and reviewed and approved by EPA shall be admissible
9 as evidence, without objection, in any proceeding under this
10 Decree. Asarco shall ensure that EPA and State personnel and
11 their authorized representatives are allowed access at reasonable
12 times to all laboratories utilized by Asarco in implementing this
13 Consent Decree. In addition, Asarco shall ensure that such
14 laboratories shall analyze all samples submitted by EPA pursuant
15 to the QAPP for quality assurance monitoring. Asarco shall
16 ensure that the laboratories it utilizes for the wet chemistry
17 analyses of samples taken pursuant to this Decree perform all
18 analyses according to accepted EPA methods. Accepted EPA methods
19 consist of those methods which are documented in the "Contract
20 Lab Program Statement of Work for Inorganic Analysis" and the
21 "Contract Lab Program Statement of Work for Organic Analysis,"
22 dated February 1988, and any amendments made thereto during the
23 course of the implementation of this Decree. Asarco shall ensure
24 that all laboratories it uses for analysis of samples taken
25 pursuant to this Consent Decree participate in an EPA or EPA-

1 equivalent QA/QC program. Asarco shall ensure that all field
2 methodologies utilized in collecting samples for subsequent
3 analysis pursuant to this Decree will be conducted in accordance
4 with the procedures set forth in the QAPP approved by EPA.

5 41. Upon request, Asarco shall allow split or duplicate
6 samples to be taken by EPA and the State or their authorized
7 representatives. Asarco shall notify EPA not less than fourteen
8 (14) days in advance of any sample collection activity unless
9 shorter notice is agreed to by EPA. In addition, EPA and the
10 State shall have the right to take any additional samples that
11 EPA or the State deem necessary. Upon request, EPA and the State
12 shall allow Asarco to take split or duplicate samples of any
13 samples it takes as part of the Plaintiff's oversight of Asarco's
14 implementation of the Work.

15 42. Asarco shall submit to EPA four (4) copies and to
16 the State two (2) copies of the results of all sampling and/or
17 tests or other data obtained or generated by or on behalf of
18 Asarco with respect to the Site and/or the implementation of this
19 Consent Decree unless EPA agrees otherwise.

20 43. Notwithstanding any provision of this Consent
21 Decree, the United States hereby retains all of its information
22 gathering and inspection authorities and rights, including
23 enforcement actions related thereto, under CERCLA, RCRA, and any
24 other applicable statutes or regulations.

IX. ACCESS AND INSTITUTIONAL CONTROLS

44. Commencing upon the date of lodging of this Consent Decree, Asarco agrees to provide the United States, the State, and their representatives, including EPA and its contractors, access at all reasonable times to the Site and any other property to which access is required for the implementation of this Consent Decree, to the extent access to the property is controlled by Asarco, for the purposes of conducting any activity related to this Consent Decree including, but not limited to:

- a. Monitoring the Work;
- b. Verifying any data or information submitted to the United States;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing additional response actions at or near the Site;
- f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Asarco or its agents, consistent with Section XXIV; and
- g. Assessing Asarco's compliance with this Consent Decree.

45. To the extent that properties within the Site or any other property to which access is required for the implementation of this Consent Decree is owned or controlled by persons other

1 than Asarco, Asarco shall use best efforts to secure from such
2 persons access for Asarco, as well as for the United States and
3 the State and their representatives, including, but not limited
4 to, their contractors, as necessary to effectuate this Consent
5 Decree. For purposes of this Paragraph, "best efforts" includes
6 the payment of reasonable sums of money in consideration of
7 access. If any access required to complete the Work is not
8 obtained within forty-five (45) days of the date of entry of this
9 Consent Decree, or within forty-five (45) days of the date EPA
10 notifies Asarco in writing that additional access beyond that
11 previously secured is necessary, Asarco shall promptly notify the
12 United States in writing, and shall include in that notification
13 a summary of the steps Asarco has taken to attempt to obtain
14 access. The United States may, as it deems appropriate, assist
15 Asarco in obtaining access. Asarco shall reimburse the United
16 States, in accordance with the procedures in Section XVI
17 (Reimbursement of Response Costs), for all costs incurred by the
18 United States in obtaining access.

19 46. Notwithstanding any provision of this Consent
20 Decree, the United States retains all of its access authorities
21 and rights, including enforcement authorities related thereto,
22 under CERCLA, RCRA and any other applicable statute or
23 regulations.

1 47. Institutional Controls.

2 a. Asarco agrees that it is appropriate and
3 necessary to impose land and groundwater use restrictions on the
4 property that it owns within the Site as covenants that will run
5 with the land for the purpose of protecting human health and the
6 environment by protecting in perpetuity the remedial actions that
7 have been, and will be taken at the Site.

8 b. The following restrictions apply to all real
9 property owned by Asarco within the Site and are binding on
10 Asarco and its lessees, transferees, successors and assigns who
11 assume any interest in such property:

12 (1) Unless approved by EPA, at no time
13 shall groundwater underlying the Site be extracted,
14 except for the limited purpose of extracting and
15 treating groundwater or monitoring groundwater levels.
Groundwater wells installed for such purpose shall
only be installed pursuant to a plan approved in
writing by the EPA Project Coordinator.

16 (2) Unless approved in writing by the EPA
17 Project Coordinator, no use or activity shall be
18 permitted on any portion of the Site which may disturb
19 or adversely affect any of the remedial measures at
20 the Site, which measures include, without limitation:
systems to collect, contain, treat, divert and
discharge groundwater or surface water, or systems to
contain or create a protective barrier covering soils
and the slag shoreline.

21 c. Asarco shall comply with the restrictions
22 identified in Paragraph 47.b for so long as it has an interest in
23 any real property within the Site. Each lease, deed, title, or
24 other instrument conveying an interest in the property shall
25 include the restrictions identified in Paragraph 47.b as
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1 covenants, conditions and restrictions. In such instrument,
2 Asarco shall retain an interest in the property sufficient to
3 assure that under State law Asarco may compel the subsequent
4 owner of the property to comply with the covenants, conditions
5 and restrictions. In addition, the conveyance document will
6 provide that the United States, on behalf of Asarco is
7 authorized, in its discretion, to enforce compliance with the
8 covenants, conditions and restrictions.

9 d. Asarco shall give written notice to EPA of its
10 intent to transfer any interest in the property at least thirty
11 (30) days prior to the anticipated transfer date. The notice
12 shall include the proposed conveyance documents. EPA reserves
13 the right to approve the conveyance language as it relates to the
14 covenants, conditions and restrictions.

15 X. REPORTING REQUIREMENTS

16 48. In addition to any other requirement of this Consent
17 Decree, Asarco shall submit four (4) copies to EPA and two (2)
18 copies to the State of written monthly progress reports that: (a)
19 describe the actions which have been taken toward achieving
20 compliance with this Consent Decree during the previous month;
21 (b) include a summary of all results of sampling and tests and
22 all other data received or generated by Asarco or its contractors
23 or agents in the previous month; (c) identify all work plans,
24 plans and other deliverables required by this Consent Decree
25 completed and submitted during the previous month; (d) describe
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1 all actions, including, but not limited to, data collection and
2 implementation of work plans, which are scheduled for the next
3 six weeks and provide other information relating to the progress
4 of construction, including, but not limited to, as relevant,
5 critical path diagrams, Gantt charts and Pert charts; (e) include
6 information regarding percentage of completion, unresolved delays
7 encountered or anticipated that may affect the future schedule
8 for implementation of the Work, and a description of efforts made
9 to mitigate those delays or anticipated delays; (f) include any
10 modifications to the work plans or other schedules that Asarco
11 has proposed to EPA or that has been approved by EPA; and (g)
12 describe all activities undertaken in support of the Community
13 Relations Plan during the previous month and those to be
14 undertaken in the next four weeks. Asarco shall submit these
15 progress reports to EPA and the State by the fifteenth day of
16 every month following the lodging of this Consent Decree until
17 EPA notifies Asarco pursuant to Paragraph 66.b of Section XIV
18 (Certification of Completion). If requested by EPA, Asarco shall
19 also provide briefings for EPA and the State to discuss the
20 progress of the Work.

21 49. Asarco shall notify EPA of any change in the
22 schedule described in the monthly progress report for the
23 performance of any activity, including, but not limited to, data
24 collection and implementation of work plans, no later than seven
25 (7) days prior to the performance of the activity.

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1 50. Upon the occurrence of any event during performance
2 of the Work that Asarco is required to report pursuant to Section
3 103 of CERCLA or Section 304 of the Emergency Planning and
4 Community Right-to-know Act (EPCRA), Asarco shall within twenty-
5 four (24) hours of the onset of such event orally notify the EPA
6 Project Coordinator or the Alternate EPA Project Coordinator (in
7 the event of the unavailability of the EPA Project Coordinator),
8 or, in the event that neither the EPA Project Coordinator nor
9 Alternate EPA Project Coordinator is available, the Emergency
10 Response Team, Region 10, United States Environmental Protection
11 Agency. These reporting requirements are in addition to the
12 reporting required by CERCLA Section 103 or EPCRA Section 304.

13 51. Within twenty (20) days of the onset of such an
14 event, Asarco shall furnish to Plaintiff a written report, signed
15 by Asarco's Project Coordinator, setting forth the events which
16 occurred and the measures taken, and to be taken, in response
17 thereto. Within thirty (30) days of the conclusion of such an
18 event, Asarco shall submit a report setting forth all actions
19 taken in response thereto.

20 52. Asarco shall submit four (4) copies of all plans,
21 reports, and data required by the SOW, Work Plans, or any other
22 approved plans to EPA in accordance with the schedules set forth
23 in such plans. Asarco shall simultaneously submit two (2) copies
24 of all such plans, reports and data to the State.
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1 53. All reports and other documents submitted by Asarco
2 to EPA (other than the monthly progress reports referred to
3 above) which purport to document Asarco's compliance with the
4 terms of this Consent Decree shall be signed by an authorized
5 representative of Asarco or its Project Coordinator.

6 XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

7 54. After review of any plan, report or other item which
8 is required to be submitted for approval pursuant to this Consent
9 Decree, EPA, after reasonable opportunity for review and comment
10 by the State, shall: (a) approve, in whole or in part, the
11 submission; (b) approve the submission upon specified conditions;
12 (c) modify the submission to cure the deficiencies;
13 (d) disapprove, in whole or in part, the submission, directing
14 that Asarco modify the submission; or (e) any combination of the
15 above. However, EPA shall not modify a submission without first
16 providing Asarco at least one notice of deficiency and an
17 opportunity to cure within ten (10) days, except where to do so
18 would cause serious disruption to the Work or where previous
19 submission(s) have been disapproved due to material defects and
20 the deficiencies in the submission under consideration indicate a
21 bad faith lack of effort to submit an acceptable deliverable.

22 55. In the event of approval, approval upon conditions,
23 or modification by EPA, pursuant to Paragraph 54.a, b, or c,
24 Asarco shall proceed to take any action required by the plan,
25 report, or other item, as approved or modified by EPA subject
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1 only to its right to invoke the Dispute Resolution procedures set
2 forth in Section XIX (Dispute Resolution) with respect to the
3 modifications or conditions made by EPA. In the event that EPA
4 modifies the submission to cure the deficiencies pursuant to
5 Paragraph 54.c and the submission has a material defect, EPA
6 retains its right to seek stipulated penalties, as provided in
7 Section XX (Stipulated Penalties).

8 56. a. Upon receipt of a notice of disapproval pursuant
9 to Paragraph 54.d, Asarco shall, within fourteen (14) days or
10 such longer time as specified by EPA in such notice, correct the
11 deficiencies and resubmit the plan, report, or other item for
12 approval. Any stipulated penalties applicable to the submission,
13 as provided in Section XX (Stipulated Penalties), shall accrue
14 during the fourteen (14) day period or otherwise specified period
15 but shall not be payable unless the resubmission is disapproved
16 or modified due to a material defect as provided in Paragraphs 57
17 and 58.

18 b. Notwithstanding the receipt of a notice of
19 disapproval pursuant to Paragraph 54.d, Asarco shall proceed, at
20 the direction of EPA, to take any action required by any non-
21 deficient portion of the submission. Implementation of any non-
22 deficient portion of a submission shall not relieve Asarco of any
23 liability for stipulated penalties under Section XX (Stipulated
24 Penalties) as to any deficient portion.

1 57. In the event that a resubmitted plan, report or
2 other item, or portion thereof, is disapproved by EPA, EPA may
3 again require Asarco to correct the deficiencies, in accordance
4 with the preceding Paragraphs. EPA also retains the right to
5 modify or develop the plan, report or other item. Asarco shall
6 implement any such plan, report, or item as modified or developed
7 by EPA, subject only to its right to invoke the procedures set
8 forth in Section XIX (Dispute Resolution).

9 58. If upon resubmission, a plan, report, or item is
10 disapproved or modified by EPA due to a material defect, Asarco
11 shall be deemed to have failed to submit such plan, report, or
12 item timely and adequately unless Asarco invokes the dispute
13 resolution procedures set forth in Section XIX (Dispute
14 Resolution) and EPA's action is overturned pursuant to that
15 Section. The provisions of Section XIX (Dispute Resolution) and
16 Section XX (Stipulated Penalties) shall govern the implementation
17 of the Work and accrual and payment of any stipulated penalties
18 during Dispute Resolution. If EPA's disapproval or modification
19 is upheld, stipulated penalties shall accrue for such violation
20 from the date on which the initial submission was originally
21 required, as provided in Section XX, (Stipulated Penalties)

22 59. All plans, reports, and other items required to be
23 submitted to EPA under this Consent Decree shall, upon approval
24 or modification by EPA, be enforceable under this Consent Decree.
25 In the event EPA approves or modifies a portion of a plan,
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1 report, or other item required to be submitted to EPA under this
2 Consent Decree, the approved or modified portion shall be
3 enforceable under this Consent Decree.

4 XII. PROJECT COORDINATORS

5 60. Unless already identified in Paragraph 118 below,
6 within twenty (20) days of lodging of this Consent Decree,
7 Asarco, EPA, and the State, will notify each other, in writing,
8 of the name, address and telephone number of their respective
9 designated Project Coordinators and Alternate Project
10 Coordinators. If a Project Coordinator or Alternate Project
11 Coordinator initially designated is changed, the identity of the
12 successor will be given to the other parties at least five (5)
13 working days before the changes occur, unless impracticable, but
14 in no event later than the actual day the change is made.
15 Asarco's Project Coordinator shall be subject to disapproval by
16 EPA, which disapproval shall not be unreasonably invoked, and
17 shall have the technical expertise sufficient to adequately
18 oversee all aspects of the Work. Asarco's Project Coordinator
19 shall not be an attorney for Asarco in this matter. Asarco's
20 Project Coordinator may assign other representatives, including
21 other contractors, to serve as a Site representative for
22 oversight of performance of daily operations during remedial
23 activities.

24 61. Plaintiff may designate other representatives,
25 including, but not limited to, EPA and State employees, and
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1 federal and State contractors and consultants, to observe and
2 monitor the progress of any activity undertaken pursuant to this
3 Consent Decree. EPA's Project Coordinator and Alternate Project
4 Coordinator shall have the authority lawfully vested in a
5 Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC)
6 by the NCP, 40 C.F.R. Part 300. In addition, EPA's Project
7 Coordinator or Alternate Project Coordinator shall have
8 authority, consistent with the NCP, to halt any Work required by
9 this Consent Decree and to take any necessary response action
10 when he or she determines that conditions at the Site constitute
11 an emergency situation or may present an immediate threat to
12 public health or welfare or the environment due to release or
13 threatened release of Waste Material.

14 XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

15 62. Within sixty (60) days of entry of this Consent
16 Decree, Asarco shall establish and maintain financial security in
17 the amount of \$45.3 million in one or more, at Asarco's election,
18 of the following forms:

- 19 (a) A surety bond guaranteeing performance of the Work;
20 (b) One or more irrevocable letters of credit equalling
21 the total estimated cost of the Work;
22 (c) A trust fund;
23 (d) A guarantee to perform the Work by one or more
24 parent corporations or subsidiaries, or by one or
25 more unrelated corporations that have a substantial
26 business relationship with Asarco; or
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1 (e) A demonstration that Asarco satisfies the
2 requirements of 40 C.F.R. Part 264.143(f) or the
3 requirements of Appendix D (Criteria for Financial
4 Assurance).

5 For the purposes of this Paragraph only, the estimated cost of
6 the Work may be reduced by the percentage that cost of the Work
7 completed in each year bears to the total estimated costs of the
8 Work.

9 63. If Asarco seeks to demonstrate the ability to
10 complete the Work through a guarantee by a third party pursuant
11 to Paragraph 62.d of this Consent Decree, Asarco shall
12 demonstrate that the guarantor satisfies the requirements of 40
13 C.F.R. Part 264.143(f). If Asarco seeks to demonstrate its
14 ability to complete the Work by means of the financial test or
15 the corporate guarantee pursuant to Paragraph 62.d or e, it shall
16 resubmit sworn statements conveying the information required by
17 40 C.F.R. Part 264.143(f) annually, on the anniversary of the
18 effective date of this Consent Decree. In the event that EPA
19 believes at any time that a financial assurance given by Asarco
20 does not meet the requirements of this Consent Decree, EPA shall
21 so notify Asarco. Within thirty (30) days of receipt of notice,
22 Asarco shall either obtain and present to EPA for approval one of
23 the other forms of financial assurance listed in Paragraph 62 of
24 this Consent Decree or present information to EPA that
25 demonstrates that the existing financial assurance meets the
26 requirements of this Consent Decree. Any determination of
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1 inadequacy of Asarco's financial assurances shall be subject to
2 dispute resolution pursuant to Section XIX (Dispute Resolution).
3 Asarco's inability to demonstrate financial ability to complete
4 the Work shall not excuse performance of any activities required
5 under this Consent Decree.

6 64. Asarco may change the form of financial assurance
7 provided under this Section at any time, upon notice to and
8 approval by EPA, provided that the new form of assurance meets
9 the requirements of this Section. In the event of a dispute,
10 Asarco may change the form of the financial assurance only in
11 accordance with the final administrative or judicial decision
12 resolving the dispute.

13 XIV. CERTIFICATION OF COMPLETION

14 65. Completion of the Remedial Action

15 a. As the Remedial Action for each primary activity
16 progresses to completion, Asarco shall notify EPA, conduct the
17 Pre-Final and Final Construction Inspection, and issue the Final
18 Construction Reports as described in the SOW, Section 3.2.2
19 (2), (3) and (4). Within ninety (90) days after Asarco concludes
20 that the Remedial Action has been fully performed and the
21 Performance Standards have been attained, Asarco shall schedule
22 and conduct a pre-certification inspection to be attended by
23 Asarco, EPA and the State. If, after the pre-certification
24 inspection, Asarco still believes that the Remedial Action has
25 been fully performed and the Performance Standards have been
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1 attained, they shall submit a written report as described in SOW
2 Section 3.2.2(6), requesting certification to EPA for approval,
3 with a copy to the State, pursuant to Section XI (EPA Approval of
4 Plans and Other Submissions) within thirty (30) days of the
5 inspection. In the report, a registered professional engineer
6 and Asarco's Project Coordinator shall state that the Remedial
7 Action has been completed in full satisfaction of the
8 requirements of this Consent Decree. The written report shall
9 include as-built drawings signed and stamped by a professional
10 engineer. The report shall contain the following statement,
11 signed by a responsible corporate official of Asarco or Asarco's
12 Project Coordinator:

13 To the best of my knowledge, after thorough investigation,
14 I certify that the information contained in or accompanying
15 this submission is true, accurate and complete. I am aware
16 that there are significant penalties for submitting false
information, including the possibility of fine and
imprisonment for knowing violations.

17 If, after completion of the pre-certification inspection and
18 receipt and review of the written report, EPA, after reasonable
19 opportunity to review and comment by the State, determines that
20 the Remedial Action or any portion thereof has not been completed
21 in accordance with this Consent Decree or that the Performance
22 Standards have not been achieved, EPA will notify Asarco in
23 writing of the activities that must be undertaken by Asarco
24 pursuant to this Consent Decree to complete the Remedial Action
25 and achieve the Performance Standards. Provided, however, that
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1 EPA may only require Asarco to perform such activities pursuant
2 to this Paragraph to the extent that such activities are
3 consistent with the "scope of the remedy selected in the ROD," as
4 that term is defined in Paragraph 32.b. EPA will set forth in
5 the notice a schedule for performance of such activities
6 consistent with the Consent Decree and the SOW or require Asarco
7 to submit a schedule to EPA for approval pursuant to Section XI
8 (EPA Approval of Plans and Other Submissions). Asarco shall
9 perform all activities described in the notice in accordance with
10 the specifications and schedules established pursuant to this
11 Paragraph, subject to its right to invoke the dispute resolution
12 procedures set forth in Section XIX (Dispute Resolution).

13 b. If EPA concludes, based on the initial or any
14 subsequent report requesting Certification of Completion and
15 after a reasonable opportunity for review and comment by the
16 State, that the Remedial Action has been performed in accordance
17 with this Consent Decree and that the Performance Standards have
18 been achieved, EPA will so certify in writing to Asarco. This
19 certification shall constitute the Certification of Completion of
20 the Remedial Action for purposes of this Consent Decree,
21 including, but not limited to, Section XXI (Covenants Not to Sue
22 by Plaintiff). Certification of Completion of the Remedial
23 Action shall not affect Asarco's obligations under this Consent
24 Decree.

1 66. Completion of the Work

2 a. Within ninety (90) days after Asarco concludes
3 that all phases of the Work (including O & M) have been fully
4 performed, Asarco shall schedule and conduct a pre-certification
5 inspection to be attended by Asarco, EPA and the State. If,
6 after the pre-certification inspection, Asarco still believes
7 that the Work has been fully performed, Asarco shall submit a
8 written report by a registered professional engineer that the
9 Work has been completed in full satisfaction of the requirements
10 of this Consent Decree. The report shall contain the following
11 statement, signed by a responsible corporate official of Asarco
12 or Asarco's Project Coordinator:

13 To the best of my knowledge, after thorough investigation,
14 I certify that the information contained in or accompanying
15 this submission is true, accurate and complete. I am aware
16 that there are significant penalties for submitting false
information, including the possibility of fine and
imprisonment for knowing violations.

17 If, after review of the written report, EPA, after reasonable
18 opportunity to review and comment by the State, determines that
19 any portion of the Work has not been completed in accordance with
20 this Consent Decree, EPA will notify Asarco in writing of the
21 activities that must be undertaken by Asarco pursuant to this
22 Consent Decree to complete the Work. Provided, however, that EPA
23 may only require Asarco to perform such activities pursuant to
24 this Paragraph to the extent that such activities are consistent
25 with the "scope of the remedy selected in the ROD," as that term
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1 is defined in Paragraph 32.b. EPA will set forth in the notice a
2 schedule for performance of such activities consistent with the
3 Consent Decree and the SOW or require Asarco to submit a schedule
4 to EPA for approval pursuant to Section XI (EPA Approval of Plans
5 and Other Submissions). Asarco shall perform all activities
6 described in the notice in accordance with the specifications and
7 schedules established therein, subject to its right to invoke the
8 dispute resolution procedures set forth in Section XIX (Dispute
9 Resolution).

10 b. If EPA concludes, based on the initial or any
11 subsequent request for Certification of Completion by Asarco and
12 after a reasonable opportunity for review and comment by the
13 State, that the Work has been performed in accordance with this
14 Consent Decree, EPA will so notify Asarco in writing.

15 XV. EMERGENCY RESPONSE

16 67. In the event of any action or occurrence during the
17 performance of the Work which causes or threatens a release of
18 Waste Material from the Site that constitutes an emergency
19 situation or may present an immediate threat to public health or
20 welfare or the environment, Asarco shall, subject to
21 Paragraph 68, immediately take all appropriate action to prevent,
22 abate, or minimize such release or threat of release, and shall
23 immediately notify the EPA's Project Coordinator, or, if the
24 Project Coordinator is unavailable, EPA's Alternate Project
25 Coordinator. If neither of these persons is available, Asarco
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1 shall notify the EPA Emergency Response Team, Region 10. Asarco
2 shall take such actions in consultation with EPA's Project
3 Coordinator or other available authorized EPA officer and in
4 accordance with all applicable provisions of the Health and
5 Safety Plans, the Contingency Plans, and any other applicable
6 plans or documents developed pursuant to the SOW. In the event
7 that Asarco fails to take appropriate response action as required
8 by this Section, and EPA takes such action instead, Asarco shall
9 reimburse EPA all costs of the response action not inconsistent
10 with the NCP pursuant to Section XVI (Reimbursement of Response
11 Costs).

12 68. Nothing in the preceding Paragraph or in this
13 Consent Decree shall be deemed to limit any authority of the
14 United States a) to take all appropriate action to protect human
15 health and the environment or to prevent, abate, respond to, or
16 minimize an actual or threatened release of Waste Material on,
17 at, or from the Site, or b) to direct or order such action, or
18 seek an order from the Court, to protect human health and the
19 environment or to prevent, abate, respond to, or minimize an
20 actual or threatened release of Waste Material on, at, or from
21 the Site, subject to Section XXI (Covenants Not to Sue by
22 Plaintiff).

23 XVI. REIMBURSEMENT OF RESPONSE COSTS

24 69. Past Response Costs, as defined in this Consent
25 Decree, are \$3,081,510.00. Asarco shall pay to the EPA Hazardous
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1 Substance Superfund within thirty (30) days of the effective date
2 of this Consent Decree \$2 million in partial reimbursement of
3 Past Response Costs. Within one (1) year of the effective date
4 of this Consent Decree Asarco shall pay the remaining
5 \$1,081,510.00 plus Interest accruing on that amount calculated
6 from the effective date of the Consent Decree through the date of
7 payment. These payments shall be made by FedWire Electronic
8 Funds Transfer ("EFT" or wire transfer) to the U.S. Department of
9 Justice account in accordance with current electronic funds
10 transfer procedures, referencing U.S.A.O. file number 9201159,
11 EPA Region 10 and Site/Spill ID No. 10-58, and DOJ case number
12 90-11-2-698A. Payment shall be made in accordance with
13 instructions provided to Asarco by the Financial Litigation Unit
14 of the United States Attorney's Office for the Western District
15 of Washington following lodging of the Consent Decree. Any
16 payments received by the Department of Justice after 4:00 p.m.
17 (Eastern Time) will be credited on the next business day. Asarco
18 shall send notice that such payment has been made to the United
19 States as specified in Section XXVI (Notices and Submissions) and
20 Joseph Penwell, Regional Financial Management Officer, 1200 6th
21 Avenue, MD-149, Seattle, Washington 98102.

22 70. Asarco shall reimburse the EPA Hazardous Substance
23 Superfund for all Future Response Costs not inconsistent with the
24 NCP. The United States will send Asarco a bill requiring
25 payment that includes a Superfund Cost Organization Recovery
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1 Enhancement System Report, which includes direct and indirect
2 costs incurred by EPA and DOJ and their contractors on an annual
3 basis. Asarco shall make all payments within thirty (30) days of
4 Asarco's receipt of each bill requiring payment, except as
5 otherwise provided in Paragraph 71. Asarco shall make all
6 payments required by this Paragraph in the form of a certified or
7 cashier's check or checks made payable to "EPA Hazardous
8 Substance Superfund" and referencing EPA Region 10 and Site ID
9 No. 10-58, and DOJ case number 90-11-2-698A and the name and
10 address of the party making payment. Asarco shall forward the
11 check(s) to:

12 Mellon Bank
13 EPA Region 10
14 ATTN: Superfund Accounting
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

15 and shall send copies of the check(s) to the United States as
16 specified in Section XXVI (Notices and Submissions) and Joseph
17 Penwell, Regional Financial Management Officer, 1200 6th Avenue,
18 MD-149, Seattle, Washington 98102.

19 71. Asarco may contest payment of any Future Response
20 Costs under Paragraph 70 if it determines that the United States
21 has made an accounting error or if it alleges that a cost item
22 that is included represents costs that are inconsistent with the
23 NCP. Such objection shall be made in writing within thirty (30)
24 days of receipt of the bill and must be sent to the United States
25 pursuant to Section XXVI (Notices and Submissions). Any such
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1 objection shall specifically identify the contested Future
2 Response Costs and the basis for objection. In the event of an
3 objection, Asarco shall within the thirty (30) day period pay all
4 uncontested Future Response Costs to the United States in the
5 manner described in Paragraph 70. Simultaneously, Asarco shall
6 establish an interest bearing escrow account in a federally-
7 insured bank acceptable to EPA and remit to that escrow account
8 funds equivalent to the amount of the contested Future Response
9 Costs. Asarco shall send to the United States, as provided in
10 Section XXVI (Notices and Submissions), a copy of the transmittal
11 letter and check paying the uncontested Future Response Costs,
12 and a copy of the correspondence that establishes and funds the
13 escrow account, including, but not limited to, information
14 containing the identity of the bank and bank account under which
15 the escrow account is established as well as a bank statement
16 showing the initial balance of the escrow account.
17 Simultaneously with establishment of the escrow account, Asarco
18 shall initiate the Dispute Resolution procedures in Section XIX
19 (Dispute Resolution). If the United States prevails in the
20 dispute, within five (5) days of the resolution of the dispute,
21 Asarco shall pay the sums due (with accrued interest) to the
22 United States, in the manner described in Paragraph 70. If
23 Asarco prevails concerning any aspect of the contested costs,
24 Asarco shall pay that portion of the costs (plus associated
25 accrued interest) for which they did not prevail to
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1 the United States, in the manner described in Paragraph 70;
2 Asarco shall be disbursed any balance of the escrow account. The
3 dispute resolution procedures set forth in this Paragraph in
4 conjunction with the procedures set forth in Section XIX (Dispute
5 Resolution) shall be the exclusive mechanisms for resolving
6 disputes regarding Asarco's obligation to reimburse the United
7 States for its Future Response Costs.

8 72. In the event that the payments required by
9 Paragraph 69 are not made by the dates required in that Paragraph
10 or the payments required by Paragraph 70 are not made within
11 thirty (30) days of Asarco's receipt of the bill, Asarco shall
12 pay Interest on the unpaid balance. The Interest to be paid on
13 Past Response Costs under this Paragraph shall begin to accrue
14 on, or continue to accrue from, the date on which the payments
15 are to be made pursuant to Paragraph 69. The Interest on Future
16 Response Costs shall begin to accrue on the date of the bill.
17 The Interest shall accrue through the date of Asarco's payment.
18 Payments of Interest made under this Paragraph shall be in
19 addition to such other remedies or sanctions available to
20 Plaintiff by virtue of Asarco's failure to make timely payments
21 under this Section. Asarco shall make all payments required by
22 this Paragraph in the manner described in Paragraph 70.

23 XVII. INDEMNIFICATION AND INSURANCE

24 73. a. The United States does not assume any liability
25 by entering into this agreement or by virtue of any designation
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1 of Asarco as EPA's authorized representative under Section 104(e)
2 of CERCLA. Asarco shall indemnify, save and hold harmless the
3 United States and its officials, agents, employees, contractors,
4 subcontractors, or representatives for or from any and all claims
5 or causes of action arising from, or on account of, negligent or
6 other wrongful acts or omissions of Asarco, its officers,
7 directors, employees, agents, contractors, subcontractors, and
8 any persons acting on their behalf or under their control, in
9 carrying out activities pursuant to this Consent Decree,
10 including, but not limited to, any claims arising from any
11 designation of Asarco as EPA's authorized representative under
12 Section 104(e) of CERCLA. Further, Asarco agrees to pay the
13 United States all costs it incurs including, but not limited to,
14 attorneys fees and other expenses of litigation and settlement
15 arising from, or on account of, claims made against the United
16 States based on negligent or other wrongful acts or omissions of
17 Asarco, its officers, directors, employees, agents, contractors,
18 subcontractors, and any persons acting on their behalf or under
19 their control, in carrying out activities pursuant to this
20 Consent Decree. The United States shall not be held out as a
21 party to any contract entered into by or on behalf of Asarco in
22 carrying out activities pursuant to this Consent Decree. Neither
23 Asarco nor any such contractor shall be considered an agent of
24 the United States.

1 b. The United States shall give Asarco notice of
2 any claim for which the United States plans to seek
3 indemnification pursuant to Paragraph 73.a, and shall consult
4 with Asarco prior to settling such claim.

5 74. Asarco waives all claims against the United States
6 for damages or reimbursement or for set-off of any payments made
7 or to be made to the United States, arising from or on account of
8 any contract, agreement, or arrangement between any one or more
9 of Asarco and any person for performance of Work on or relating
10 to the Site, including, but not limited to, claims on account of
11 construction delays. In addition, Asarco shall indemnify and
12 hold harmless the United States with respect to any and all
13 claims for damages or reimbursement arising from or on account of
14 any contract, agreement, or arrangement between Asarco and any
15 person for performance of Work on or relating to the Site,
16 including, but not limited to, claims on account of construction
17 delays.

18 75. No later than fifteen (15) days before commencing
19 any on-site Work, Asarco shall secure, and shall maintain until
20 the first anniversary of EPA's Certification of Completion of the
21 Remedial Action pursuant to Paragraph 65 of Section XIV
22 (Certification of Completion) comprehensive general liability
23 insurance and automobile insurance. The comprehensive general
24 liability coverage shall have an annual aggregate limit of not
25 less than ten (10) million dollars. In addition, Asarco shall
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1 secure and shall maintain automobile liability insurance as
2 follows: bodily injury liability -- five hundred thousand
3 dollars (\$500,000) each person; one million dollars (\$1,000,000)
4 each occurrence; property damage liability -- five hundred
5 thousand dollars (\$500,000) each occurrence. All insurance
6 policies shall name the United States as additional insured. In
7 addition, for the duration of this Consent Decree, Asarco shall
8 satisfy, or shall ensure that its contractors or subcontractors
9 satisfy, all applicable laws and regulations regarding the
10 provision of worker's compensation insurance for all persons
11 performing the Work on behalf of Asarco in furtherance of this
12 Consent Decree. Prior to commencement of the Work under this
13 Consent Decree, Asarco shall provide to EPA certificates of such
14 insurance and, upon written request, a copy of each insurance
15 policy. Asarco shall resubmit such certificates and copies of
16 any previously requested policies each year on the anniversary of
17 the effective date of this Consent Decree. If Asarco
18 demonstrates by evidence satisfactory to EPA that any contractor
19 or subcontractor maintains insurance equivalent to that described
20 above, or insurance covering the same risks but in a lesser
21 amount, then, with respect to that contractor or subcontractor,
22 Asarco need provide only that portion of the insurance described
23 above which is not maintained by the contractor or subcontractor.

XVIII. FORCE MAJEURE

76. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Asarco, of any entity controlled by Asarco, or of Asarco's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Asarco's best efforts to fulfill the obligation. The requirement that Asarco exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring, and (b) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

77. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Asarco shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Office of Environmental Cleanup, EPA Region 10, within forty-eight (48) hours of when Asarco first knew that the event might cause a delay. Within five (5) days thereafter, Asarco shall provide in writing to EPA an explanation and

1 description of the reasons for the delay; the anticipated
2 duration of the delay; all actions taken or to be taken to
3 prevent or minimize the delay; a schedule for implementation of
4 any measures to be taken to prevent or mitigate the delay or the
5 effect of the delay; Asarco's rationale for attributing such
6 delay to a force majeure event if it intends to assert such a
7 claim; and a statement as to whether, in the opinion of Asarco,
8 such event may cause or contribute to an endangerment to public
9 health, welfare or the environment. Asarco shall include with
10 any notice all available documentation supporting its claim that
11 the delay was attributable to a force majeure event. Failure to
12 comply with the above requirements shall preclude Asarco from
13 asserting any claim of force majeure for that event for the
14 period of time of such failure to comply, and for any additional
15 delay caused by such failure. Asarco shall be deemed to know of
16 any circumstance of which Asarco, any entity controlled by Asarco
17 or Asarco's contractors knew or should have known.

18 78. If EPA agrees that the delay or anticipated delay is
19 attributable to a force majeure event, the time for performance
20 of the obligations under this Consent Decree that are affected by
21 the force majeure event will be extended by EPA for such time as
22 is necessary to complete those obligations. An extension of the
23 time for performance of the obligations affected by the force
24 majeure event shall not, of itself, extend the time for
25 performance of any other obligation. If EPA does not agree that
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1 the delay or anticipated delay has been or will be caused by a
2 force majeure event, EPA will notify Asarco in writing of its
3 decision. If EPA agrees that the delay is attributable to a
4 force majeure event, EPA will notify Asarco, in writing, of the
5 length of the extension, if any, for performance of the
6 obligations affected by the force majeure event.

7 79. If Asarco elects to invoke the dispute resolution
8 procedures set forth in Section XIX (Dispute Resolution), it
9 shall do so no later than fifteen (15) days after receipt of
10 EPA's notice. In any such proceeding, Asarco shall have the
11 burden of demonstrating by a preponderance of the evidence that
12 the delay or anticipated delay has been or will be caused by a
13 force majeure event, that the duration of the delay or the
14 extension sought was or will be warranted under the
15 circumstances, that best efforts were exercised to avoid and
16 mitigate the effects of the delay, and that Asarco complied with
17 the requirements of Paragraphs 76 and 77, above. If Asarco
18 carries this burden, the delay at issue shall be deemed not to be
19 a violation by Asarco of the affected obligation of this Consent
20 Decree identified to EPA and the Court.

21 XIX. DISPUTE RESOLUTION

22 80. Unless otherwise expressly provided for in this
23 Consent Decree, the dispute resolution procedures of this Section
24 shall be the exclusive mechanism to resolve disputes arising
25 under or with respect to this Consent Decree. However, the
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1 procedures set forth in this Section shall not apply to actions
2 by the United States to enforce obligations of Asarco that have
3 not been disputed in accordance with this Section.

4 81. Any dispute which arises under or with respect to
5 this Consent Decree shall in the first instance be the subject of
6 informal negotiations between the parties to the dispute. The
7 period for informal negotiations shall not exceed twenty (20)
8 days from the time the dispute arises, unless it is modified by
9 written agreement of the parties to the dispute. The dispute
10 shall be considered to have arisen when one party sends the other
11 parties a written Notice of Dispute.

12 82. a. In the event that the parties cannot resolve a
13 dispute by informal negotiations under the preceding Paragraph,
14 then the position advanced by EPA shall be considered binding
15 unless, within ten (10) days after the conclusion of the informal
16 negotiation period, Asarco invokes the formal dispute resolution
17 procedures of this Section by serving on the United States a
18 written Statement of Position on the matter in dispute,
19 including, but not limited to, any factual data, analysis or
20 opinion supporting that position and any supporting documentation
21 relied upon by Asarco. The Statement of Position shall specify
22 Asarco's position as to whether formal dispute resolution should
23 proceed under Paragraph 83 or 84.

24 b. Within fourteen (14) days after receipt of
25 Asarco's Statement of Position, EPA will serve on Asarco its
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1 Statement of Position, including, but not limited to, any factual
2 data, analysis, or opinion supporting that position and all
3 supporting documentation relied upon by EPA. EPA's Statement of
4 Position shall include a statement as to whether formal dispute
5 resolution should proceed under Paragraph 83 or 84. Within ten
6 (10) days after receipt of EPA's Statement of Position, Asarco
7 may submit a reply.

8 c. If there is disagreement between EPA and Asarco
9 as to whether dispute resolution should proceed under Paragraph
10 83 or 84, the parties to the dispute shall follow the procedures
11 set forth in the Paragraph determined by EPA to be applicable.
12 However, if Asarco ultimately appeals to the Court to resolve the
13 dispute, the Court shall determine which Paragraph is applicable
14 in accordance with the standards of applicability set forth in
15 Paragraphs 83 and 84.

16 83. Formal dispute resolution for disputes pertaining to
17 the selection or adequacy of any response action and all other
18 disputes that are accorded review on the administrative record
19 under applicable principles of administrative law shall be
20 conducted pursuant to the procedures set forth in this Paragraph.
21 For purposes of this Paragraph, the adequacy of any response
22 action includes, without limitation: (i) the adequacy or
23 appropriateness of plans, procedures to implement plans, or any
24 other items requiring approval by EPA under this Consent Decree;
25 and (ii) the adequacy of the performance of response actions
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1 taken pursuant to this Consent Decree. Nothing in this Consent
2 Decree shall be construed to allow any dispute by Asarco
3 regarding the validity of the ROD's provisions.

4 a. An administrative record of the dispute shall be
5 maintained by EPA and shall contain all statements of position,
6 including supporting documentation, submitted pursuant to this
7 Section. Where appropriate, EPA may allow submission of
8 supplemental statements of position by the parties to the
9 dispute.

10 b. The Director of the Office of Environmental
11 Cleanup, EPA Region 10, will issue a final administrative
12 decision resolving the dispute based on the administrative record
13 described in Paragraph 83.a. This decision shall be binding upon
14 Asarco, subject only to the right to seek judicial review
15 pursuant to Paragraph 83.c and d.

16 c. Any administrative decision made by EPA pursuant
17 to Paragraph 83.b shall be reviewable by this Court, provided
18 that a motion for judicial review of the decision is filed by
19 Asarco with the Court and served on all Parties within ten (10)
20 days of receipt of EPA's decision. The motion shall include a
21 description of the matter in dispute, the efforts made by the
22 parties to resolve it, the relief requested, and the schedule, if
23 any, within which the dispute must be resolved to ensure orderly
24 implementation of this Consent Decree. The United States may
25 file a response to Asarco's motion.

1 d. In proceedings on any dispute governed by this
2 Paragraph, Asarco shall have the burden of demonstrating that the
3 decision of the Office of Environmental Cleanup Director is
4 arbitrary and capricious or otherwise not in accordance with law.
5 Judicial review of EPA's decision shall be on the administrative
6 record compiled pursuant to Paragraph 83.a.

7 84. Formal dispute resolution for disputes that neither
8 pertain to the selection or adequacy of any response action nor
9 are otherwise accorded review on the administrative record under
10 applicable principles of administrative law, shall be governed by
11 this Paragraph.

12 a. Following receipt of Asarco's Statement of
13 Position submitted pursuant to Paragraph 82, the Director of the
14 Office of Environmental Cleanup, EPA Region 10, will issue a
15 final decision resolving the dispute. The Office of
16 Environmental Cleanup Director's decision shall be binding on
17 Asarco unless, within ten (10) days of receipt of the decision,
18 Asarco files with the Court and serves on the parties a motion
19 for judicial review of the decision setting forth the matter in
20 dispute, the efforts made by the parties to resolve it, the
21 relief requested, and the schedule, if any, within which the
22 dispute must be resolved to ensure orderly implementation of the
23 Consent Decree. The United States may file a response to
24 Asarco's motion.

1 b. Notwithstanding Paragraph 15 of this Consent
2 Decree, judicial review of any dispute governed by this Paragraph
3 shall be governed by applicable principles of law.

4 85. The invocation of formal dispute resolution
5 procedures under this Section shall not extend, postpone or
6 affect in any way any obligation of Asarco under this Consent
7 Decree not directly in dispute, unless EPA or the Court agrees
8 otherwise. Stipulated penalties with respect to the disputed
9 matter shall continue to accrue but payment shall be stayed
10 pending resolution of the dispute as provided in Paragraph 94.
11 Notwithstanding the stay of payment, stipulated penalties shall
12 accrue from the first day of noncompliance with any applicable
13 provision of this Consent Decree. In the event that Asarco does
14 not prevail on the disputed issue, stipulated penalties shall be
15 assessed and paid as provided in Section XX (Stipulated
16 Penalties).

17 XX. STIPULATED PENALTIES

18 86. Asarco shall be liable for stipulated penalties in
19 the amounts set forth in Paragraphs 87 and 88 to the United
20 States for failure to comply with the requirements of this
21 Consent Decree specified below, unless excused under Section
22 XVIII (Force Majeure). "Compliance" by Asarco shall include
23 completion of the activities under this Consent Decree or any
24 work plan or other plan approved under this Consent Decree
25 identified below in accordance with all applicable requirements
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of law, this Consent Decree, the SOW, the RDRs and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

87. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st -- 14th day
\$5,000	15th -- 30th day
\$10,000	31st day and beyond.

b. Activities/Deliverables

- (i) Conducting the Work without EPA approval.
- (ii) Submission of the Remedial Design Work Plan and associated SAP/QAPP.
- (iii) Submission of the Remedial Action Work Plan and associated SAP/QAPP.
- (iv) Submission of corrected or revised Remedial Design and Remedial Action Work Plans in accordance with Section XI (EPA Approval of Plans and Other Submissions).
- (v) Initiation of remedial action activity in the specified time and in accordance with the plans required by this Consent Decree and the SOW.
- (vi) Completion of remedial action activities in the specified time and in accordance with the plans required by this Consent Decree and the SOW.

1 88. The following stipulated penalties shall accrue per
2 violation per day for failure to submit timely or adequate
3 reports or other written documents pursuant to Paragraphs 48
4 through 53, for failure to submit any other reports or written
5 documents required by this Consent Decree, the SOW or RDRs, or
6 for the failure to perform any other requirement under this
7 Consent Decree, except Section XIII (Assurance of Ability to
8 Complete Work), and Paragraph 75 (Insurance).

9 Penalty Per Violation <u>Per Day</u>	<u>Period of Noncompliance</u>
10 \$500	1st -- 14th day
11 \$1,000	15th -- 30th day
12 \$5,000	31st day and beyond.

13 89. In the event that EPA assumes performance of a
14 portion or all of the Work pursuant to Paragraph 102 of Section
15 XXII (Covenants Not to Sue by Plaintiff), in addition to EPA's
16 Response Costs, Asarco shall be liable for a stipulated penalty
17 in the amount of three (3) times the cost incurred by EPA to
18 perform the work or \$750,000, whichever is less.

19 90. All penalties shall begin to accrue on the day after
20 the complete performance is due or the day a violation occurs,
21 and shall continue to accrue through the final day of the
22 correction of the noncompliance or completion of the activity.
23 However, stipulated penalties shall not accrue: (1) with respect
24 to a deficient submission under Section XI (EPA Approval of Plans
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1 and Other Submissions), during the period, if any, beginning on
2 the 31st day after EPA's receipt of such submission until the
3 date that EPA notifies Asarco of any deficiency; (2) with respect
4 to a decision by the Director of the Office of Environmental
5 Cleanup, EPA Region X, under Paragraph 83.b or 84.a of Section
6 XIX (Dispute Resolution), during the period, if any, beginning on
7 the 21st day after the date that Asarco's reply to EPA's
8 Statement of Position is received until the date that the
9 Director issues a final decision regarding such dispute; or (3)
10 with respect to judicial review by this Court of any dispute
11 under Section XIX (Dispute Resolution), during the period, if
12 any, beginning on the 31st date after the Court's receipt of the
13 final submission regarding the dispute until the date that the
14 Court issues a final decision regarding such dispute. Nothing
15 herein shall prevent the simultaneous accrual of separate
16 penalties for separate violations of this Consent Decree.

17 91. Following EPA's determination that Asarco has failed
18 to comply with a requirement of this Consent Decree, EPA may give
19 Asarco written notification of the same and describe the
20 noncompliance. EPA may send Asarco a written demand for the
21 payment of the penalties. However, penalties shall accrue as
22 provided in the preceding Paragraph regardless of whether EPA has
23 notified Asarco of a violation.

24 92. All penalties accruing under this Section shall be
25 due and payable to the United States within thirty (30) days of
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Asarco's receipt from EPA of a demand for payment of the penalties, unless Asarco invokes the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check made payable to "EPA Hazardous Substances Superfund," shall be mailed to:

Mellon Bank
EPA Region 10
ATTN: Superfund Accounting
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

shall indicate that the payment is for stipulated penalties, shall reference EPA Region 10 and Site ID #10-58, and the DOJ case number and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVI (Notices and Submissions) and to Joseph Penwell, Regional Financial Management Officer, 1200 6th Avenue, MD-149, Seattle, Washington 98102.

93. The payment of penalties shall not alter in any way Asarco's obligation to complete the performance of the Work required under this Consent Decree.

94. Penalties shall continue to accrue as provided in Paragraph 90 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued

1 penalties determined to be owing shall be paid to EPA within
2 fifteen (15) days of the agreement or the receipt of EPA's
3 decision or order;

4 b. If the dispute is appealed to this Court and
5 the United States prevails in whole or in part, Asarco shall pay
6 all accrued penalties determined by the Court to be owed to EPA
7 within sixty (60) days of receipt of the Court's decision or
8 order, except as provided in Subparagraph c below;

9 c. If the District Court's decision is appealed by
10 any Party, Asarco shall pay all accrued penalties determined by
11 the District Court to be owing to the United States into an
12 interest-bearing escrow account within sixty (60) days of receipt
13 of the Court's decision or order. Penalties shall be paid into
14 this account as they continue to accrue, at least every sixty
15 (60) days. Within fifteen (15) days of receipt of the final
16 appellate court decision, the escrow agent shall pay the balance
17 of the account to EPA or to Asarco to the extent that they
18 prevail.

19 95. a. If Asarco fails to pay stipulated penalties when
20 due, the United States may institute proceedings to collect the
21 penalties, as well as interest. Asarco shall pay Interest on the
22 unpaid balance, which shall begin to accrue on the date of demand
23 made pursuant to Paragraph 92.

24 b. Nothing in this Consent Decree shall be
25 construed as prohibiting, altering, or in any way limiting the
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1 ability of the United States to seek any other remedies or
2 sanctions available by virtue of Asarco's violation of this
3 Decree or of the statutes and regulations upon which it is based,
4 including, but not limited to, penalties pursuant to Section
5 122(1) of CERCLA. Provided, however, that the United States
6 shall not seek civil penalties pursuant to Section 122(1) of
7 CERCLA for any violation for which a stipulated penalty is
8 provided herein, except in the case of a willful violation of the
9 Consent Decree.

10 96. Notwithstanding any other provision of this
11 Section, the United States may, in its unreviewable discretion,
12 waive any portion of stipulated penalties that have accrued
13 pursuant to this Consent Decree.

14 XXI. COVENANTS NOT TO SUE BY PLAINTIFF

15 97. In consideration of the actions that will be
16 performed and the payments that will be made by Asarco under the
17 terms of the Consent Decree, and except as specifically provided
18 in Paragraphs 98, 99, and 101 of this Section, the United States
19 covenants not to sue or to take administrative action against
20 Asarco pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C.
21 §§ 9606 and 9607(a), and Section 7003 of RCRA, 42 U.S.C. § 6973,
22 relating to the Site. Except with respect to future liability,
23 these covenants not to sue shall take effect upon the receipt by
24 EPA of the payments required by Paragraph 69 of Section XVI
25 (Reimbursement of Response Costs). With respect to future
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1 liability, these covenants not to sue shall take effect upon
2 Certification of Completion of the Remedial Action by EPA
3 pursuant to Paragraph 65 of Section XIV (Certification of
4 Completion). These covenants not to sue are conditioned upon the
5 satisfactory performance by Asarco of its obligations under this
6 Consent Decree. These covenants not to sue extend only to Asarco
7 and do not extend to any other person.

8 98. United States' Pre-certification reservations.

9 Notwithstanding any other provision of this Consent Decree, the
10 United States reserves, and this Consent Decree is without
11 prejudice to, the right to institute proceedings in this action
12 or in a new action, or to issue an administrative order seeking
13 to compel Asarco (a) to perform further response actions relating
14 to the Site or (b) to reimburse the United States for additional
15 costs of response if, prior to Certification of Completion of the
16 Remedial Action:

17 (i) Conditions at the Site, previously unknown to EPA,
18 are discovered, or

19 (ii) Information, previously unknown to EPA, is received,
20 in whole or in part,

21 and these previously unknown conditions or information together
22 with any other relevant information indicates that the Remedial
23 Action is not protective of human health or the environment.

24 99. United States' Post-certification reservations.

25 Notwithstanding any other provision of this Consent Decree, the
26 United States reserves, and this Consent Decree is without
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1 prejudice to, the right to institute proceedings in this action
2 or in a new action, or to issue an administrative order seeking
3 to compel Asarco (a) to perform further response actions relating
4 to the Site or (b) to reimburse the United States for additional
5 costs of response if, subsequent to Certification of Completion
6 of the Remedial Action:

7 (i) Conditions at the Site, previously unknown to EPA,
8 are discovered, or

9 (ii) Information previously unknown to EPA, is received,
10 in whole or in part,

11 and these previously unknown conditions or this information
12 together with other relevant information indicate that the
13 Remedial Action is not protective of human health or the
14 environment.

15 100. For purposes of Paragraph 98, the information and
16 the conditions known to EPA shall include only that information
17 and those conditions known to EPA as of the date the ROD was
18 signed and set forth in the Record of Decision for the Site and
19 the administrative record supporting the Record of Decision. For
20 purposes of Paragraph 99, the information and the conditions
21 known to EPA shall include only that information and those
22 conditions known to EPA as of the date of Certification of
23 Completion of the Remedial Action and set forth in the Record of
24 Decision, the administrative record supporting the Record of
25 Decision, the post-ROD administrative record or in any
26 information received by EPA pursuant to the requirements of this
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1 Consent Decree prior to Certification of Completion of the
2 Remedial Action.

3 101. General reservations of rights. The covenants not
4 to sue set forth above do not pertain to any matters other than
5 those expressly specified in Paragraph 97. The United States
6 reserves, and this Consent Decree is without prejudice to, all
7 rights against Asarco with respect to all other matters,
8 including but not limited to, the following:

- 9 (a) Claims based on a failure by Asarco to meet a
10 requirement of this Consent Decree;
- 11 (b) Liability arising from the past, present, or future
12 disposal, release, or threat of release of Waste
13 Materials outside of the Site;
- 14 (c) Liability for future disposal of Waste Material at
15 the Site, other than as provided in the ROD, the
16 Work, or otherwise ordered by EPA;
- 17 (d) Liability for damages for injury to, destruction of,
18 or loss of natural resources, and for the costs of
19 any natural resource damage assessments;
- 20 (e) Criminal liability;
- 21 (f) Liability for violations of federal or state law
22 which occur during or after implementation of the
23 Remedial Action;
- 24 (g) Liability for costs that the United States will
25 incur related to the Site but are not within the
26 definition of Future Response Costs; and
- 27 (h) Liability for subsurface groundwater at the Site and
28 the offshore sediments.
- (i) Liability, prior to Certification of Completion of
the Remedial Action, for additional response actions
that EPA determines are necessary to achieve
Performance Standards, but that cannot be required

1 pursuant to Paragraph 32 (Modification of the SOW or
2 Related Work Plans).

3 102. Work Takeover. In the event EPA determines that
4 Asarco has ceased implementation of any portion of the Work, is
5 seriously or repeatedly deficient or late in its performance of
6 the Work, or is implementing the Work in a manner which may cause
7 an endangerment to human health or the environment, EPA may
8 assume the performance of all or any portions of the Work as EPA
9 determines necessary. Asarco may invoke the procedures set forth
10 in Section XIX (Dispute Resolution), Paragraph 83, to dispute
11 EPA's determination that takeover of the Work is warranted under
12 this Paragraph. Costs incurred by the United States in
13 performing the Work pursuant to this Paragraph shall be
14 considered Future Response Costs that Asarco shall pay pursuant
15 to Section XVI (Reimbursement of Response Costs).

16 103. Notwithstanding any other provision of this Consent
17 Decree, the United States retains all authority and reserves all
18 rights to take any and all response actions authorized by law.

19 XXII. COVENANTS BY ASARCO

20 104. Covenant Not to Sue. Subject to the reservations
21 in Paragraph 105, Asarco hereby covenants not to sue and agrees
22 not to assert any claims or causes of action against the United
23 States with respect to the Site or this Consent Decree,
24 including, but not limited to: (a) any direct or indirect claim
25 for reimbursement from the Hazardous Substance Superfund
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(established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, or any other provision of law; (b) any claims against the United States, including any department, agency, or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, except as set forth in Paragraph 105.b.; or (c) any claims arising out of response activities at the Site, including claims based on EPA's selection of response actions, oversight of response activities or approval of plans for such activities.

105. a. Asarco reserves, and this Consent Decree is without prejudice to, claims against the United States subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of Asarco's plans or activities. The foregoing applies only to

1 claims which are brought pursuant to any statute other than
2 CERCLA and for which the waiver of sovereign immunity is found in
3 a statute other than CERCLA.

4 b. Asarco reserves, and this Consent Decree is
5 without prejudice to, CERCLA claims in contribution and (if
6 permitted by applicable law) response cost recovery against the
7 United States, including any department, agency, or
8 instrumentality of the United States, for response costs that
9 Asarco has incurred or will incur at the Site. The United States
10 does not waive, but reserves, for itself and all of its
11 departments, agencies or instrumentalities, any and all defenses
12 that it may have to Asarco's reserved claims, whether
13 substantive, procedural, jurisdictional, or other. Additionally,
14 this Paragraph shall not be construed as notice to the United
15 States of such claims.

16 106. Nothing in this Consent Decree shall be deemed to
17 constitute preauthorization of a claim within the meaning of
18 Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.
19 300.700(d).

20 XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

21 107. Nothing in this Consent Decree shall be construed
22 to create any rights in, or grant any cause of action to, any
23 person not a Party to this Consent Decree. The preceding
24 sentence shall not be construed to waive or nullify any rights
25 that any person not a signatory to this decree may have under
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1 applicable law. Each of the Parties expressly reserves any and
2 all rights (including, but not limited to, any right to
3 contribution), defenses, claims, demands, and causes of action
4 which each Party may have with respect to any matter,
5 transaction, or occurrence relating in any way to the Site
6 against any person not a Party hereto.

7 108. The Parties agree, and by entering this Consent
8 Decree this Court finds, that Asarco is entitled, as of the
9 effective date of this Consent Decree, to protection from
10 contribution actions or claims as provided by CERCLA Section
11 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this
12 Consent Decree.

13 109. Asarco agrees that with respect to any suit or
14 claim for contribution brought by it for matters related to this
15 Consent Decree it will notify the United States in writing no
16 later than sixty (60) days prior to the initiation of such suit
17 or claim.

18 110. Asarco also agrees that with respect to any suit or
19 claim for contribution brought against it for matters related to
20 this Consent Decree it will notify in writing the United States
21 within ten (10) days of service of the complaint on it. In
22 addition, Asarco shall notify the United States within ten (10)
23 days of service or receipt of any Motion for Summary Judgment and
24 within ten (10) days of receipt of any order from a court setting
25 a case for trial.

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1 111. In any subsequent administrative or judicial
2 proceeding initiated by the United States for injunctive relief,
3 recovery of response costs, or other appropriate relief relating
4 to the Site, Asarco shall not assert, and may not maintain, any
5 defense or claim based upon the principles of waiver, res
6 judicata, collateral estoppel, issue preclusion, claim-splitting,
7 or other defenses based upon any contention that the claims
8 raised by the United States in the subsequent proceeding were or
9 should have been brought in the instant case; provided, however,
10 that nothing in this Paragraph affects the enforceability of the
11 covenants not to sue set forth in Section XXI (Covenants Not to
12 Sue by Plaintiff).

13 XXIV. ACCESS TO INFORMATION

14 112. Asarco shall provide to EPA and the State, upon
15 request, copies of all documents and information within its
16 possession or control or that of its contractors or agents
17 relating to activities at the Site or to the implementation of
18 this Consent Decree, including, but not limited to, sampling,
19 analysis, chain of custody records, manifests, trucking logs,
20 receipts, reports, sample traffic routing, correspondence, or
21 other documents or information related to the Work. Asarco shall
22 also make available to EPA and the State, for purposes of
23 investigation, information gathering, or testimony, its
24 employees, agents, or representatives with knowledge of relevant
25 facts concerning the performance of the Work.

1 113. a. Asarco may assert business confidentiality
2 claims covering part or all of the documents or information
3 submitted to Plaintiff under this Consent Decree to the extent
4 permitted by and in accordance with Section 104(e)(7) of CERCLA,
5 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or
6 information determined to be confidential by EPA will be afforded
7 the protection specified in 40 C.F.R. Part 2, Subpart B. If no
8 claim of confidentiality accompanies documents or information
9 when they are submitted to EPA and the State, or if EPA has
10 notified Asarco that the documents or information are not
11 confidential under the standards of Section 104(e)(7) of CERCLA,
12 the public may be given access to such documents or information
13 without further notice to Asarco.

14 b. Asarco may assert that certain documents,
15 records and other information are privileged under the attorney-
16 client privilege or any other privilege recognized by federal
17 law. If Asarco asserts such a privilege in lieu of providing
18 documents, it shall provide the Plaintiff with the following:
19 (i) the title of the document, record, or information; (ii) the
20 date of the document, record, or information; (iii) the name and
21 title of the author of the document, record, or information; (iv)
22 the name and title of each addressee and recipient; (v) a
23 description of the contents of the document, record, or
24 information; and (vi) the privilege asserted by Asarco.
25 However, no documents, reports, or other information created or
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1 generated pursuant to the requirements of the Consent Decree
2 shall be withheld on the grounds that they are privileged.

3 114. No claim of confidentiality shall be made with
4 respect to any data, including, but not limited to, all sampling,
5 analytical, monitoring, hydrogeologic, scientific, chemical, or
6 engineering data, or any other data or factual information
7 evidencing conditions related to the Work or implementation of
8 the Consent Decree contained in otherwise privileged documents.

9 XXV. RETENTION OF RECORDS

10 115. Until ten (10) years after Asarco's receipt of
11 EPA's notification pursuant to Paragraph 66.b of Section XIV
12 (Certification of Completion of the Work), Asarco shall preserve
13 and retain all records and documents now in its possession or
14 control or which come into its possession or control that relate
15 in any manner to the performance of the Work or liability of any
16 person for response actions conducted and to be conducted at the
17 Site, regardless of any corporate retention policy to the
18 contrary. Until ten (10) years after Asarco's receipt of EPA's
19 notification pursuant to Paragraph 66.b of Section XIV
20 (Certification of Completion), Asarco shall also instruct its
21 contractors and agents to preserve all documents, records, and
22 information of whatever kind, nature, or description relating to
23 the performance of the Work.

24 116. At the conclusion of this document retention
25 period, Asarco shall notify the United States at least ninety
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1 (90) days prior to the destruction of any such records or
2 documents, and, upon request by the United States, Asarco shall
3 deliver any such records or documents to EPA. Asarco may assert
4 that certain documents, records, and other information are
5 privileged under the attorney-client privilege or any other
6 privilege recognized by federal law. If Asarco asserts such a
7 privilege, it shall provide the Plaintiff with the following:

8 (a) the title of the document, record, or information; (b) the
9 date of the document, record, or information; (c) the name and
10 title of the author of the document, record, or information; (d)
11 the name and title of each addressee and recipient; (e) a
12 description of the subject of the document, record, or
13 information; and (f) the privilege asserted by Asarco. However,
14 no documents, reports, or other information created or generated
15 pursuant to the requirements of the Consent Decree shall be
16 withheld on the grounds that they are privileged.

17 117. Asarco hereby certifies that to the best of its
18 knowledge and belief, after thorough inquiry, it has not altered,
19 mutilated, discarded, destroyed, or otherwise disposed of any
20 records, documents, or other information relating to its
21 potential liability regarding the Site since notification of
22 potential liability by the United States or the State or the
23 filing of suit against it regarding the Site and that it has
24 fully complied with any and all EPA requests for information
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1 pursuant to Section 104(e) and 122(e) of CERCLA 42 U.S.C. 9604(e)
2 and 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

3 XXVI. NOTICES AND SUBMISSIONS

4 118. Whenever, under the terms of this Consent Decree,
5 written notice is required to be given or a report or other
6 document is required to be sent by one Party to another, it shall
7 be directed to the individuals at the addresses specified below,
8 unless those individuals or their successors give notice of a
9 change to the other Parties in writing. All notices and
10 submissions shall be considered effective upon receipt, unless
11 otherwise provided. Written notice as specified herein shall
12 constitute complete satisfaction of any written notice
13 requirement of the Consent Decree with respect to the United
14 States, EPA, the State, and Asarco, respectively.

15
16 As to the United States:

17 Chief, Office of Environmental Enforcement Section
18 Environment and Natural Resources Division
19 U.S. Department of Justice
20 P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ No. 90-11-2-698A

21 As to EPA:

22
23 Director, Office of Environmental Cleanup
24 United States Environmental Protection Agency
25 Region 10 (HW-113)
26 1200 Sixth Avenue
27 Seattle, Washington 98101

1 Piper Peterson Lee
EPA Project Coordinator
2 United States Environmental Protection Agency
Region 10 (HW-113)
3 1200 Sixth Avenue
Seattle, Washington 98101
4

5 As to the State:

6 Bruce Cochran
State Project Coordinator
Site Cleanup Section
7 Toxics Cleanup Program
Department of Ecology
8 P.O. Box 47600
Olympia, Washington 98504-7600
9

10 As to Asarco:

11 Thomas L. Aldrich
Asarco Site Manager
ASARCO Incorporated
12 P.O. Box 1677
Tacoma, Washington 98401
13

14 XXVII. EFFECTIVE DATE

15 119. The effective date of this Consent Decree shall be
16 the date upon which this Consent Decree is entered by the Court,
except as otherwise provided herein.
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18 XXVIII. RETENTION OF JURISDICTION

19 120. This Court retains jurisdiction over both the
20 subject matter of this Consent Decree and Asarco for the duration
of the performance of the terms and provisions of this Consent
21 Decree for the purpose of enabling any of the Parties to apply to
22 the Court at any time for such further order, direction, and
23 relief as may be necessary or appropriate for the construction or
24 modification of this Consent Decree, or to effectuate or enforce
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1 compliance with its terms, or to resolve disputes in accordance
2 with Section XIX (Dispute Resolution) hereof.

3 XXIX. APPENDICES

4 121. The following appendices are attached to and
5 incorporated into this Consent Decree:

6 "Appendix A" is the Record of Decision dated March 24, 1995.

7 "Appendix B" is the map depicting the Site.

8 "Appendix C" is the Statement of Work and attached RDRs.

9 "Appendix D" is the Criteria for Financial Assurance.

10 XXX. COMMUNITY RELATIONS

11 122. Asarco shall cooperate with EPA and the State in
12 providing information regarding the Work to the public. As
13 requested by EPA or the State, Asarco shall participate in the
14 preparation of such information for dissemination to the public
15 and in public meetings which may be held or sponsored by EPA or
16 the State to explain activities at or relating to the Site.

17 XXXI. MODIFICATION

18 123. Schedules specified in this Consent Decree for
19 completion of the Work may be modified by agreement of EPA and
20 Asarco. All such modifications shall be made in writing.

21 124. Except as provided in Paragraph 32 ("Modification
22 of the SOW or Related Work Plans), no material modifications
23 shall be made to the SOW without written notification to and
24 written approval of the United States, Asarco, and the Court.
25 Prior to providing its approval to any modification, the United
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1 States will provide the State with a reasonable opportunity to
2 review and comment on the proposed modification. Modifications
3 to the SOW that do not materially alter that document may be made
4 by written agreement between EPA, after providing the State with
5 a reasonable opportunity to review and comment on the proposed
6 modification, and Asarco.

7 125. Nothing in this Decree shall be deemed to alter the
8 Court's power to enforce, supervise, or approve modifications to
9 this Consent Decree.

10 XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

11 126. This Consent Decree shall be lodged with the Court
12 for a period of not less than thirty (30) days for public notice
13 and comment in accordance with Section 122(d)(2) of 42 U.S.C.
14 § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves
15 the right to withdraw or withhold its consent if the comments
16 regarding the Consent Decree disclose facts or considerations
17 which indicate that the Consent Decree is inappropriate,
18 improper, or inadequate. Asarco consents to the entry of this
19 Consent Decree without further notice.

20 127. If, for any reason, the Court should decline to
21 approve this Consent Decree in the form presented, this agreement
22 is voidable at the sole discretion of any Party and the terms of
23 the agreement may not be used as evidence in any litigation
24 between the Parties.

XXXIII. SIGNATORIES/SERVICE

128. Each undersigned representative of Asarco to this Consent Decree and the Assistant Attorney General for Environment and Natural Resources of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

129. Asarco hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified Asarco in writing that it no longer supports entry of the Consent Decree.

130. Asarco shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process by mail on behalf of it with respect to all matters arising under or relating to this Consent Decree. Asarco hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS

3
22nd

DAY OF

January 1997
Nov. 1996

Robert H. Bryan
UNITED STATES DISTRICT JUDGE

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States v. ASARCO Incorporated, relating to the
3 Asarco Tacoma Smelter Site, Operable Unit 02 of the Commencement
4 Bay Nearshore/Tideflats Superfund Site.

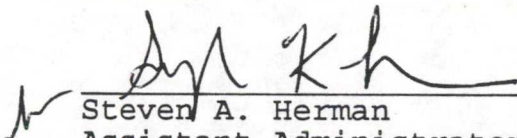
5
6 FOR THE UNITED STATES OF AMERICA

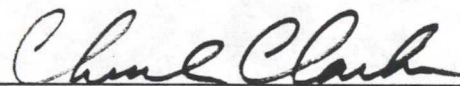
7
8 Date: May 31/1996

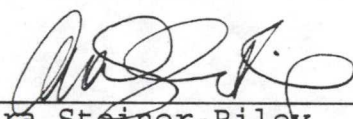
Lois J. Schiffer
Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

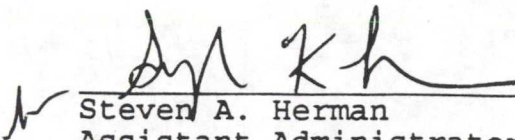
Thomas W. Sweigle
Thomas W. Sweigle
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530


Brian Kypnis/TWS
Assistant United States Attorney
Western District of Washington
U.S. Department of Justice
3600 SeaFirst Fifth Avenue Plaza
Seattle, Washington 98104


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3 
4 Steven A. Herman
5 Assistant Administrator
6 Office of Enforcement and
7 Compliance Assurance
8 Washington, D.C. 20460

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10 
11 Chuck Clarke
12 Regional Administrator, Region 10
13 U.S. Environmental Protection
14 Agency
15 1200 Sixth Avenue
16 Seattle, Washington 98101

17
18 
19 Cara Steiner-Riley
20 Assistant Regional Counsel
21 U.S. Environmental Protection
22 Agency, Region 10
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20 Agency, Region 10
21 1200 Sixth Avenue
22 Seattle, Washington 98101

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the
2 matter of United States v. ASARCO Incorporated, relating to the
3 Asarco Smelter Site, Operable Unit 02 of the Commencement Bay
Nearshore/Tideflats Superfund Site.

4 FOR ASARCO INCORPORATED:

5 Date: February 15, 1996

Michael D. Verner

6 VICE PRESIDENT
7 ASARCO Incorporated
8 180 Maiden Lane
9 New York, New York 10038

10 Agent authorized to accept service on behalf of ASARCO:

Thomas L. Aldrich

11 Thomas L. Aldrich
12 Asarco Site Manager
13 North 51st and Baltimore Streets
14 Tacoma, Washington 98407
15 (206) 756-0203
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